

Represent from the Author.
J. Hargrave
For Memoirs of
the life of Mr. Fearn,
in the European
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AN
E S S A Y

On the LEARNING of

Contingent Remainders

AND

EXECUTORY DEVISES.

By CHARLES FEARNE, Esq;

BARRISTER AT LAW, OF THE INNER TEMPLE,

AUTHOR OF THE LEGIGRAPHICAL CHART OF
LANDED PROPERTY.

Scire autem propriè est, rem ratione et per causam cognoscere.

THE FOURTH EDITION,

Revised, Corrected, and greatly Enlarged by the Author.

VOL. - I.

OF CONTINGENT REMAINDERS,

With TABLES and INDEX.

L O N D O N :

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AN

Y A S E

OF THE

Contingent

AND

EXHIBITION DEVICES

BY CHARLES

EXHIBITION DEVICES



MUSEUM
BRITANNICUM

OF CONTINGENT

LONDON

TO
JAMES BOOTH,

Of Lincoln's-Inn, Esquire*.

S I R,

YOUR great eminence in that branch of the profession, which the subject of the following sheets particularly concerns, necessarily makes the sanction of your name, a considerable object of the author's ambition.—At the same time that, the partiality he experiences in the honour of your intimacy, good opinion, and friendship, forbids him to descend into a formal apology, for the freedom to which that ambition has impelled him, in this Address; which he hopes, Sir, you will

* This Address was originally prefixed to the Third Edition of the present Essay; and though the continuing it after Mr. Booth's decease, may possibly subject the author to some imputation of vanity, yet, that is a price he willingly pays, for the gratification of preserving this public testimony, of his respect for that Gentleman's name.

accept, as a public testimony of his unfeigned respect for your great professional character and abilities, and of his wishes to acknowledge the particular obligations he is under, to your good opinion and friendship. Such an indulgence, Sir, he begs leave to assure you, will be no unimportant addition to the favours already felt by, Sir,

Your most respectful,

most obliged, and

obedient servant,

CHARLES FEARNE.

To the Reader.

UNDER the approbation, with which the Profession have honoured the author's attempts, in the former editions of the Essay on Contingent Remainders and Executory Devises, he is proud, in feeling himself above the call, for any apologetic or commendatory introduction, to the improved edition he is now submitting to that candour, which has already afforded him so much reason for exultation. He shall therefore, trouble his readers with no further prefatory address on the present occasion, than just to prepare them with some convenient information relative to this new edition. In respect to which, he has to observe, *First*, that the accumulation of (what he hopes will be found useful) matter, since the last publication of his book, has expanded it into two volumes; of which, that now offered to their attention, embraces the doctrine of Contingent Remainders, leaving the distinct title of Executory Devises, for the intire subject of the volume which is to follow. *Secondly*, that the variety of references in late books, to the pages of the last edition of the essay, has induced the preservation of those pages, so far as practicable, by a marginal registry of them in the present edition. And though the al-

terations now introduced, have, in some instances, prevented the perfect adherence to this plan; yet, the author flatters himself, it is effected to a degree sufficient to answer his end, of leading the Reader, with little trouble, to the places referred to by the pages of the third edition. And, *lastly*, that the marginal references in the present edition, to the pages *infra* and *supra*, are always to the pages registered (from the last edition) in the margin. The impossibility of foreseeing in what pages, of the new edition, the places referred to in the sequel would fall, left no alternative to this mode in *prospective* references; and to have adopted a different mode in the *retrospective* direction, would have been rather inconsistent, and productive of confusion.

With these observations, the author cheerfully commits himself to the Reader's benignity, for excusing any errors which have escaped the limits of his knowledge, or the powers of his attention, on a subject of so much intricate and abstruse learning, as that which occupies the ensuing sheets. Whatever may be his defects of ability, his industry claims the recognition of a classical thesis.

— *Est quôdam prodire tenus, si non datur ultra.*

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The Reader's Attention is requested to the following Corrections.

Page. Line.

- 5 opp. 15 in margin, for *Park* read *Perk*.
 23 8 strike out *in*.
 64 18 and 27 for *brother* read *son*.
 67 21 and 22 substitute *latter* and *former* for each other.
 68 at bottom in margin, refer to 2 *Bro. Cas, Parl*, 458.
 104 27 for *above* read *below*.
 119 3 for *apply* read *applies*.
 165 15 for *in artificial* read *inartificial*.
 184 8 for *our Courts* read *a Court*.
 197 3 for *or* read *of*.
 214 6 for *first* read *one*.
 243 23 for *impeachment* read *committing*.
 246 opp. 25 in margin, strike out *tail*.
 270 16 for *W.* read *N*.
 371 last but one, for *R.* read *K*.
 425 27 for *B.* read *A*.

INTRODUCTION.

WHEN we consider estates with regard to the certainty and the time of the enjoyment of them, we may distinguish them into

Estates {	vested {	in Possession,	
			Reversions, vested Remainders, such Executory Devises, Future Uses, Con- ditional Limitations and other future Interests as are not referred to, or made to depend on, a pe- riod or event that is <i>uncertain</i> .
	in Interest, as {		Contingent Remain- ders, and such Ex- ecutory Devises, Fu- ture Uses, Condi- tional Limitations, and other future Interests as are re- ferred to, or made to depend on, an Event that is <i>un- certain</i> .
	{ contingent, as		

An estate is *vested*, when there is an *immediate fixed right* of present or future enjoyment.

An estate is *vested in possession*, when there exists a *right of present* enjoyment.

An estate is *vested in interest*, when there is a *present fixed right* of future enjoyment.

An estate is *contingent*, when a *right* of enjoyment is to accrue, on an event which is *dubious* and *uncertain*.

Contingent remainders, and *executory devises*, are the professed subjects of the ensuing work; in which, however, other future interests are occasionally considered under their respective relations to the more immediate subjects of those two titles.

A

Contingent Remainder defined,

A N D

Its several Kinds distinguished, &c.

A CONTINGENT REMAINDER, is, a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate (unless it be a mere trust estate) determine before such event or condition happens, the remainder will never take effect; as will appear, when I come to treat of the time when a contingent remainder is to vest.

Vide infra
p. 233.

Under this definition we may properly distinguish four sorts of contingent remainders.—*First*, Where the remainder depends entirely on a *contingent* determination of the preceding estate itself.—*Secondly*, Where the contingency, on which the remainder is to

Contingent Remainders

take effect, is independent of the determination of the preceding estate.—*Thirdly*, Where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it.—*Fourthly*, Where the person, to whom the remainder is limited, is not yet ascertained, or not yet in being.

First, Where the remainder depends intirely on a *contingent* determination of the preceding estate itself; as if *A.* make a feoffment to the use of *B.* till *C.* returns from *Rome*, and after such return of *C.* then to remain over in fee; here the particular estate is limited to determine on the return of *C.* and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen; and therefore the remainder, which depends intirely upon the determination of the preceding estate by it, is dubious and contingent.—So where a fine was levied to the use of *A.* and the heirs-male of his body, until he the said *A.* should do such a thing; and after such a thing done by the said *A.* to the use of *B.* in tail: *A.* died without issue, and without performing the condition; and it was adjudged the remainder was contingent, and never took place.

3 Rep. 20. a.

Poph. 97. Arton v. Hare,

and vide
3 Leon. 182.

Secondly,

Secondly, Where some uncertain event, unconnected with, and collateral to the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder; as if a lease be made to *A.* for life; remainder to *B.* for life; and if *B.* die before *A.* remainder to *C.* for life; here the event of *B.*'s dying before *A.* does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to *C.*'s remainder; but such event is dubious, it may or may not happen, and the remainder depending on it is therefore contingent.—So if lands be given to *A.* in tail, and if *B.* come to *Westminster-hall* such a day, to *B.* in fee; here *B.*'s coming to *Westminster-hall* has no connection with the determination of *A.*'s estate; but as it is an uncertain event, and the remainder to *B.* is not to take place unless it should happen, such remainder is therefore a contingent remainder.

3 Rep. 20. a.
10 Rep. 85.
Co. Lit. 378,
a.

4 Leon, 237.
pl. 563.
Park. 156.

Thirdly, Where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate; as if a lease be made to *J. S.* for life, and after the death of *J. D.* the lands to remain to another in fee; now it is certain that *J. D.* must die some time or other, but his death may not happen

3 Rep. 20.

Polexf. 57.
in the case of
Weale and
Lower.

3 Rep. 20.

Vide infra,
p. 16, 206.

till after the determination of the particular estate by the death of *J. S.* and therefore such remainder is contingent.—So in case of a lease for life to *A.* and after the death of *A.* and *M.* the remainder to *B.* in fee, this is a contingent remainder; for the particular estate being only for the life of *A.* and the remainder not to commence till after the death of *A.* and *M.* if *A.* die before *M.* the particular estate will end before the remainder can commence; which is very possible, and therefore such remainder is contingent.—So if a feoffment be to the use of *A.* for 21 years, if he shall so long live, and after his death to the use of *B.* in fee; here *A.* may survive the 21 years; if he should, the particular estate would determine before the remainder could commence, and therefore such remainder is contingent; and being so, is void, for want of a preceding freehold to support it, as will appear hereafter.

3 Rep. 20.
Co. Lit. 378.

Fourthly, Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the *right heirs* of *J. S.*; now there can be no such person as the right heir of *J. S.* until the death of *J. S.* (for *nemo est hæres viventis*) which may not happen till after the determination of the particular estate by the death
of

of tenant for life, therefore such remainder is contingent.—So where a remainder is limited to the first son of *B.* who has no son then born; here *B.* may never have a son, or if he should, the particular estate may determine before the birth of such son, therefore this remainder is contingent.—So if an estate be limited to two for life, remainder to the *survivor* of them in fee, the remainder is contingent, for it is uncertain who will be the survivor.

1 Ventr. 306.

Cro. Car. 102

Contingent remainders appear to have been generally distributed into *three* kinds only; namely, the three last specified in the above division of them. But I think it obvious that the *first* sort above noticed cannot be brought within any one of the *other three* descriptions, from the connexion of the contingent event with the determination of the preceding estate itself.—But perhaps the instances adduced of this *first* kind of contingent remainders, may at the first glance appear to be cases of *conditional* or *contingent limitations*, not strictly falling within the definition of a *remainder*; it may therefore be proper to obviate any doubt of this nature, by shewing that the cases I have cited, as instances of the *first* of the *four* classes, into which I have distinguished contingent remainders, are remainders in the most strict technical sense of that word.

Contingent Remainders

(8) A remainder is defined by Lord Coke, *1 Inst.* 143. *a.* to be "a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at one time." It follows from this definition, that wherever the *whole fee* is first limited, there can be no remainder in the strict sense of that word; for the *whole* being first disposed of, no *remnant* exists to limit over. Therefore, if I limit an estate to the use of *A. and his heirs*, till *C.* returns from *Rome*, and after the return of *C.* to the use of *B.* in fee; here the whole fee being first limited to the use of *A.* there is no remnant left to limit over; and consequently the limitation to *B.* cannot be a *remainder* within the foregoing definition.

But where I limit an estate to the use of *A. until C.* returns from *Rome*, and after the return of *C.* to the use of *B.* in fee; here I do not limit the whole fee to the use of *A.* (as in the former case) but only a particular estate to endure *till* the return of *C.* which being an uncertain period, such particular estate is a freehold; having therefore limited only a particular estate, extending in its first creation no further than to *C.*'s return, the residue of the estate after *C.*'s return, is a remnant of the whole estate in the lands, expectant on that particular estate; and if

I at

I at the same time limit this remnant to the use of *B.* and his heirs, it is a *remainder* within the express words of the above definition.

So if I limit an estate to the use of *A.* and the heirs of his body, *until C.* returns from *Rome*, and after *C.*'s return, to the use of *B.* in fee; here, again, I do not limit the whole fee to *A.* but only a portion of it, that is, an estate-tail, determinable on *C.*'s return from *Rome*; and having limited no estate beyond *C.*'s return, the residue of the estate, after *C.*'s return, is a remnant expectant on the particular estate limited to the use of *A.* which if I at the same time limit to the use of *B.* and his heirs, it comes precisely within the above definition of a remainder. In these cases, the remainder is not limited to take effect at all events, but only on the contingency of the particular estate's determining according to its limitation, on *C.*'s return from *Rome*; which return being an uncertain event, that may or may not happen, the remainder, which depends on its happening, is of course contingent.

(9)

The true point of distinction, as I take it, between such conditional limitations over as are, and such as are not *remainders*, in the strict sense of that word, lies here; the former are limited to commence where the first estate

is,

The discussion beginning on page 16 is a valuable instance of the author's power of legal discrimination. H.

(10)

is, by the very nature and extent of its original limitation, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession, upon an event which may happen before the regular determination, to which that first estate is liable from the nature of its original limitation, and so as to rescind it. And in this latter case, I apprehend, it is the same thing, whether the *whole fee* is disposed of in the first limitation, or not.

Vide infra,
p. 190.

Thus, if I limit an estate to the use of *A.* for life, or to the use of *A.* indefinitely, provided that when *C.* returns from *Rome* it shall *thenceforth immediately* be to the use of *B.* in fee; here the first estate is an estate for the life of *A.* (not an estate limited only *till C.'s* return, as in the former cases) the *remnant* therefore of the whole fee in this case is, what remains expectant on the determination of *A.'s* life-estate, by such events as a life-estate is liable to be determined by; and therefore, when after such a limitation to *A.* I limit the use to *B.* from *C.'s* return from *Rome*, and so take up and make such new estate to commence and take effect in possession, not from any regular determination of the estate before limited to *A.* (his estate being for life, and not merely until *C.'s* return from *Rome*, as in the former

former cases) but from an event which may happen sooner, it is evident this limitation to the use of *B.* is not confined to the remnant of the estate expectant on the particular estate before given to *A.* but may eventually interfere with, and in part repeal and defeat that first estate, instead of awaiting its regular expiration or determination; and therefore it does not fall within the above definition of a remainder. But limitations of this nature are properly termed *conditional limitations* to distinguish them on the one hand from *conditions*, of which only the grantor or his heir can take advantage, and on the other from *remainders* in the strict and proper sense of the word as above defined: and though these *conditional limitations* are not valid in conveyances at common law, yet, within certain limits, they are good in wills and conveyances to uses,

and vide
infra, p. 19,
20.

Vide infra, p.
187 to 203.

The distinction I have above stated, between what I have styled such conditional limitations as are, and such as are not, *remainders*, in the *strict sense of that word*, having been the subject of some notice, in a work, for which the profession cannot but feel great obligations to the accuracy, professional ability and judgment of its author, I think it incumbent on me to make some observations
on

Dougl. Rep.
fol. 727.
note (1).
Infra, 191.

on the grounds of that animadversion. Mr. Douglas, in a note on the case of *Goodtitle v. Billington*, observes, that all the *definitions* (meaning of a *remainder*) in *that case* cited and relied on, point only at this essential quality of a *remainder*, that it must be so limited, as that it may by *possibility* be capable of vesting in possession at the latest, at the regular or natural determination of the particular estate—that it does not cease to be a remainder, because it may vest in possession on an event, which from the terms, or from the legal nature of the original limitation, shall defeat the particular estate before its natural or regular determination:—And he instances the determination of an estate for life by forfeiture before its natural expiration, by death of a tenant for life.

Now it is remarkable, that of the four quotations in the case of *Goodtitle v. Billington* referred to as *definitions*, only two of them affect to *define or describe* what a remainder is; the other two merely lay down a rule as to the time when a remainder must *vest*, without attempting a *definition* of it. One of the two definitions is Lord Coke's, which I have above referred to; in which he calls it a *remnant* of an estate in lands, &c. *expectant* upon a particular estate, &c. the other is from
Noy's

Noy's Maxims, which styles it the *residue* of an estate at the time *appointed over*, and that must be *grounded* on some *particular estate*.

Surely remnant and residue in those two definitions are synonymous; and being referred to a *particular estate before limited*, seem confined to what is *not before included* in that particular estate. If that be admitted, can it be said they only point out that it must be limited, so as to be by *possibility* capable of vesting in possession *at farthest* on the regular determination of the particular estate? Do not they regularly import, that it must not *abrogate*, or *abridge* the particular estate, on any event, in which from the nature and extent given it by its original limitation, it was not determinable? If the limitation over may take effect in possession in defeasance or exclusion of any part of the particular estate in any event, which is not a determination of such particular estate in its own nature, can that, *in strictness*, answer the description of a *remnant or residue* only expectant on, or appointed over after *such particular estate*? How can we annul or repeal the very object or ground of reference, without, in strictness, abolishing the reference itself? As to the instance of a remainder coming into possession by forfeiture of tenant for life, I am not aware of its force upon the question; because forfeiture

feiture is one of the regular modes of determination incident to an estate for life, and to which its nature is subject in its original limitation.

Mr. Douglas proceeds to observe, that some have been inclined to consider conditional limitations after particular estates (as for instance, after an estate for life) but limited to vest in possession on an event that may happen before the death of tenant for life, as not being remainders, which he considers as too great a refinement; and says, that no *decided cases*, that he was aware of, have ever considered this *last sort of limitations* as not being remainders; that they had all the *legal incidents and attributes* of remainders, and might be barred in the same manner. He refers to the case, to which his note is subjoined, in support of his sentiments; and concludes with treating the distinction as *merely verbal*, and observing (I think very justly) that all conditional limitations in wills seem reducible either to the head of executory devises, or of contingent remainders.

However specious may be the arguments for considering the distinction, at this day, as *too refined*, or *merely verbal*, I think, that its flowing from the terms of the most authentic definitions of a remainder, its having been repeatedly

repeatedly adopted and recognized in judicial arguments and inferences, as well as proceeded on as the ground of actual decision in a court of justice, gives it some claim to the attention of those for whom these sheets are calculated; I therefore thought it a proper subject of notice in the former edition of this book, and think I should not have stood excused, if I had not attended to the further call for extending that notice in the present edition.

As to the definitions of a remainder affording the distinction in question, I think it unnecessary to add any thing to my preceding observations to evince it.—That the distinction has been adopted and recognized in judicial arguments and inferences, appears from the authorities referred to in the sequel of this Essay, respecting the incapacity of a remainder's taking effect at common law in defeazance or abridgement of the particular estate. And that a decided case has actually considered the *sort of limitations* in question as *not being remainders*, but denied their validity *as such*, may be seen in a *reported* decision, which I shall notice in its proper place, that seems to go the whole length of that position. It will follow, that such limitations have not *all the legal incidents and attributes* of remainders. The instances wherein they have been
barred

Vide *infra*,
188, et seq.

Vide *Cogan v. Cogan*.
Cro. Eliz.
360. et *infra*,
191.

Infra, 191.

barred in the same manner are, I believe, reducible to limitations on a vested *estate-tail*, in which predicament a recovery by tenant in tail bars every *executory limitation*, as well as a remainder; or else to such *contingent limitations*, as upon examination appear conformable to the definition of a remainder; as that which has given occasion to the observations I am now considering, will, I think, appear to be, when analyzed in a future page of these sheets.

Suppose an estate devised to *A.* for life, remainder to *B.* in fee, provided that if *A.* should refuse to take the testator's surname within a short limited time, or certain other lands should descend to him, then his estate should cease, and the lands go immediately to the remainder-man or his heirs—or a limitation to *A.* for life, remainder to *B.* for life, remainder to *C.* and the heirs of his body, remainder to *D.* in fee, with a proviso that upon the accruer of certain other lands to *A.* or to *B.* or to *C.* or his issue, the estate limited by the will to the person to whom such other lands should so accrue, should thereupon cease, and the devised lands go immediately to the next in remainder, according to the will; or, suppose a devise to *A.* for life, provided that if the testator's son should return from the *East Indies* within two years

years after the testator's death, the estate of *A.* should thereupon cease, and the lands should go to the son for life, or in tail, would such limitations be *contingent remainders* barrable by the first tenant for life as such? If so, the tenant for life would have nothing more to do than to make a demise for 99 years in trust for himself, and then levy a fine, or make a feoffment, to get entirely rid of them. But if the decided case, I have referred to, be law, the limitations I have put are conditional limitations, which, though void in conveyances at common law, are admitted to operate in a will as executory devises, and consequently are not barrable as contingent remainders. And if this be true, the doctrine, which blends with remainders, limitations to take effect on an event that is to determine the particular estate (even supposing it only for life) independently of the determination to which it is liable in the nature or extent of its original limitation, seems to require some qualification; and, to ascertain that qualification, we must attend to the distinction, however *refined* or *verbal*, which the books present us with, between conditional limitations that are, and such as are not strictly remainders. That such limitations, when created by *will*, are reducible, *in effect*, to contingent remainders, or *executory devises*, seems pretty clear; but that several of them,

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which,

and vide established legal distinctions no less refined and *verbal* between the words *term* and *time*, or *space* of years, 1 Co. 155. and between heirs *of* and *on* the body, *infra*, 30.

which, if we discard the distinction I have been treating of, might rank as *remainders*, are *not so*, and have not the *legal* incidents or attributes of remainders, nor are barrable in the same manner, I think the cases I have put and have referred to, leave no room to deny.

It may here be observed, that the contingency of the remainder in cases falling under the first of the above descriptions, arises entirely from its depending on the determination of the particular estate on a *contingency* only; for if the remainder be so limited as to depend on the determination of the particular estate whether such contingency happen or not, it is then a *vested* instead of *contingent* remainder. As if the limitation had been to the use of *B.* till *C.* return from *Rome*, and from and after such return of *C.* or the death of *B.* then to remain over. Here as *B.*'s estate could not in any event exceed his life for want of words to limit the inheritance, and being therefore in its *utmost extent* only an estate for *his life*, and the remainder being limited to take effect either on its determination by *C.*'s return from *Rome*, or by *B.*'s death, that is on its determination in all events, it would be *vested* and not depend on the *uncertain event* of *C.*'s return in *B.*'s life-time.

Thus,

Thus, where one levied a fine to the use of himself for life, remainder to his two daughters, till *A.* his son returned from beyond sea, and should come to the age of 21, *or die*, which should first happen, and after the return of *A.* and his age of 21 years *or death* which should first happen, to the said *A.* in tail. *A.* returned *under* 21; and the question was whether the remainder was good, and would take effect before he attained 21. And it was held good; for though his attaining 21 and return were uncertain, yet his *death was certain*, and therefore the remainder did not merely *depend on uncertainties*. And the chief justice observed, that the disjunctive expression *or die* in the end of the sentence, made the copulatives before to be disjunctives; so that the remainder was to vest (which must mean in *possession*, as it did not depend on *uncertainties*) upon the accomplishment of either of the events. And that the daughters had estates for life conditionally, that is, (we must understand) if neither of the said events *quousque* the lands were limited to them determined their estates before their deaths. And accordingly lord *Coke* says, that it was adjudged the prior use ceased on either of the events of coming from beyond sea or attaining full age.

Lord Vauxe's case, Cro. Eliz. 369.
1 Leon. 243.
Co. Lit. 225.
a.

Co. Lit. 225.
a.

- (11) Every species of contingent remainders may, I apprehend, be reduced to one or other of the four descriptions under which I have arranged them; but although every one of those descriptions seems necessary, in order to comprise in our general distribution every known instance of a contingent remainder; yet we must remember, that several cases which fall literally under one or other of the *two last* of those four descriptions, are nevertheless ranked among *vested* estates.

To begin with those cases which are exceptions to the *third* of the foregoing descriptions, I must observe, that in some cases of a limitation for a long term of years, as 80 or upwards, determinable on the life of a person then in being, with remainder over on the death of that person, to a person *in esse*, (as a limitation to *A.* for 80 years, if *B.* so long live, with remainder over after the death of *B.* to *C.* in fee,) it has been held, that notwithstanding the remainder over is in this case limited to take effect on an event (*viz.* the death of *B.*) which possibly may not happen till after the expiration of the preceding estate for 80 years, yet as the chance against such event's happening before the expiration of the preceding term is exceedingly small, such remainder shall be considered as

vested;

vested; and that the mere possibility that a life in being may endure for 80 years to come, does not amount to a degree of uncertainty sufficient to constitute a contingent remainder.

(12)

Note that I wrote on opinion this day in conformity to the principle of the doctrine. J. H. Hutt. 119.2. by. Napper v. Sanders.

Thus, in the case of *Napper and Sanders*, where *A.* made a feoffment to the use of herself for life, and after to the use of the feoffees for 80 years, if *B.* and *C.* his wife should so long live, and if *C.* survived *B.* then to the use of her for life, and after the decease of *C.* to the use of *D.* in tail, with other remainders over; the question was, whether the remainders subsequent to the remainder for life of *C.* were contingent or vested? Now this question, we are to observe, must have depended on two points; *first*, Whether the contingency upon which the estate for life of *C.* was limited to depend, *viz.* her surviving her husband, should extend to all the subsequent remainders, and their taking effect depend likewise on that contingency; and *secondly*, Supposing the subsequent remainders were not to depend on the contingency of *C.*'s surviving her husband, but to take place at her decease, let her survive him or not, Then whether such remainders were not to be deemed contingent, in regard of the possibility of the determination of the preceding estates before the event should happen, on

(13)

which these remainders were to take effect, viz. the death of *C.*; which possibility consisted in this, that *C.* and her husband might both outlive the term of 80 years, and then (supposing *A.* to be dead) it is obvious, there would be no preceding estate subsisting, nor that period yet arrived at which the remainders were limited to take effect.

But, however, it was resolved by all the court, that these remainders were not contingent, but vested presently: though it was agreed that *C.*'s estate for life was contingent on the event of her surviving her husband. And the case of Lord *Derby* was cited, where a feoffment was made to the use of *E.* in tail, with remainder to the use of the feoffee for 80 years, if *H.* should so long live, and after his decease to the use of *F.* in tail, with remainder to the use of Lord *Derby*; and it was adjudged, that the remainder vested presently, and that the possibility that *H.* might have over-lived the 80 years would not make the remainders contingent,

Vid. Lit.
Rep. 370.

Pollexf. 67.

So it was said by Hale C. J. in the case of *Weale* and *Lower*, that if a feoffment be made to the use of *A.* for 99 years, if he shall so long live, and after his death to the use of *B.* in fee, this shall not be contingent, but it shall be presumed his life will not exceed 99 years;

years; but that it had been otherwise, if it had been made but for 21 years.

In a case of this nature in *Chancery*, where *A.* devised lands to *B.* his eldest son, for the term of 60 years, if he should so long live, and from and after his decease to his grandson *D.* (son of the said *B.*) in tail, *B.* and *D.* suffered a recovery; an objection was taken to the recovery, for that the devise to *B.* being only for 60 years if he should so long live, and after his decease to *D.* the freehold during the life of *B.* was in abeyance. It was argued that the limitation of the estate-tail was good, expectant on the term of 60 years; and Lord *Derby's* case was cited, as in point, that the devise over, from and immediately after the decease of *B.* ought to be intended of his dying within the term; which was highly presumable, *B.* being then upwards of 40 years of age. But the court said it would be hard to make such construction on the words of the will, as to say, where land is limited to a man for 60 years, if he shall so long live, and from and after his decease to another, that it must be meant from and after his decease *within the term*; for suppose he out-lived the term, should the remainder-man take in the life-time of the first devisee? That would be a construction

(14)

Beverley v.
Beverley,
2 Vern. 131.

N. B. There was a decree in favour of the recovery upon another point.

contrary to the words and intention of the testator.

(15)

In this last case, no objection was taken to the validity of the subsequent limitation to *D.* on the ground of its being a freehold to commence *in futuro*; for this, we are to observe, was the case of a will, where the limitation of a freehold to commence *in futuro* is allowed to take effect under certain restrictions; as will appear, when we come to treat of executory devises.

Vide infra,
p. 298. & seq.

But in this sort of limitations, (when not by *will*, or by way of *use*) if the term of years is so short, as to leave a common possibility that the life on which it is determinable may exceed it, there should be a present vested freehold estate to prevent the limitation over being void, as a freehold to commence *in futuro*. Indeed, in both the cases, of *Napper v. Sanders* and *Lord Derby*, above cited, a preceding freehold being limited to the feofor, left no room for this objection. But the case above cited, as put by lord *Hale*, stands independent of any preceding freehold; and though it seems capable of being supported upon the principle of a preceding freehold arising by implication, agreeable to the cases of

Vide p. 12,
13. *supra*.

of *Penbay* and *Hurrel*, and *Pybus v. Mitford* Vide infra, cited below, yet there seems to be no sort of P. 17, 30. occasion for such resort. Because the allowed improbability of the life's exceeding the term of years determinable thereon, appears sufficient to take such remainders, as those in *Napper v. Sanders* and *Lord Derby* and the case put by *Hale*, out of the description of freeholds to commence *in futuro*.

It is generally true, that in the case of a (16) limitation to *A.* for 21 years, if he shall so long live, and after his death to *B.* in fee, the remainder to *B.* is void, as being a freehold to commence *in futuro*, viz. after the decease of *A.*, no freehold having been limited so as to take effect before that period. 3 Rep. 20. Because, in this case, it is very possible that the period limited for the remainder to take effect from, viz. the decease of *A.* may not happen till after the determination of the preceding estate, viz. the term of years; in which event the remainder could not take effect at all, as I have already observed in a preceding page. Its taking effect is therefore uncertain, in regard of this possibility of the preceding estate's determining before the event happens, from whence the remainder is to commence; and should it take effect at all, it must be *in futuro*; that is, after the event is decided on which its taking effect depends. Vid. p. 3.

depends. Here, then, being no preceding freehold limited, this remainder (which must take effect at some future period, if at all) is strictly nothing else than a freehold limited to commence *in futuro*.

(17)

It is the allowed common possibility of the life's exceeding the term, which creates such a contingency in respect to the remainder's taking effect, as brings that remainder within the description of a freehold limited to commence *in futuro*, and consequently, within the direct application of the rule which denies any effect to limitations of that kind.

But where we do not admit such a degree of possibility of the life's exceeding the term, as is supposed sufficient to create a contingency in the remainder, there, I apprehend, the remainder cannot fall within the description of a freehold to commence *in futuro*. For when we suppose the remainder to be vested, we of consequence admit that it passes immediately, subject to and expectant on the preceding term; for otherwise it cannot be vested; and then it is a freehold commencing *in presenti*, and not *in futuro*. If the life cannot exceed the term, and the term must determine with the life, the limiting an estate to commence from the expiration of the life, is, in effect, limiting it to commence from the

the determination of the term ; in which latter mode of limitation there could exist no doubt of the remainder's passing immediately and being vested. And upon these principles alone, without recurring to any other, I think the case put, and distinction taken, by C. J. *Supra*, 13. *Hale*, above cited, may be admitted as law.

But here, perhaps, the case of *Penbay and Hurrell*, may, if not considered with some degree of attention, be mistaken as an authority against this doctrine. That case, as stated by *Vernon*, was a conveyance by *A.* to the use of trustees for 70 years, if *A.* should so long live, remainder to trustees for 3000 years, and from and after the death of *A.* to *B.* his son for life, with divers remainders over. The objection was, that the limitation to *B.* together with the remainders over were void, being an estate of freehold to commence *in futuro*; for the first freehold estate was limited to *B.* which was not to arise until the death of *A.* and no estate for life was limited to *A.* unless an estate for life should be supposed to result back to him. After solemn argument upon the point, and a case stated to the judges, it was decreed, that an estate for life resulted to *A.* which supported the limitation over. Now the question may be asked, why, if the doctrine just now treated of

Penhay v.
Hurrell.
2 Vern. 370.

(18)

of had been admitted, there could be any occasion to recur to that of resulting uses, in order to support these limitations over, seeing they were preceded by two successive terms, of 70 and of 3000 years, which it could not be supposed the life of *A.* could possibly exceed?

(19)

In answer to which we are to observe, it is very true, that in this case, there was no room for any contingency in the limitation to *B.* on the score of any supposed possibility of the preceding estates determining before the period when that limitation was to take effect, viz. the death of *A.*; it was therefore not to any such contingency, that this limitation owed the quality of a freehold to commence *in futuro*, but to a cause of a very different nature. The truth is, this limitation to *B.* was not properly a remainder, because it was not limited to commence or take effect when the preceding estates were to determine; there was a preceding term of 3000 years, which was not determinable on the life of *A.* at whose death the limitation to *B.* was to take effect; and therefore this limitation to *B.* which was to take effect without regard to, and at a period different from the determination of the preceding estates, could not be a remainder, within that definition of a remainder

der which I have considered in a former page. Vide p. 7 & 8. *supra*.

Now if this limitation to *B.* did not pass a remainder expectant on the preceding estates, it could pass no vested interest previous to the decease of *A.*; for the preceding limitations left no interest or estate which could pass immediately, but by way of remainder expectant on their determination; consequently, the limitation to *B.* passing no vested interest previous to the decease of *A.* must therefore have been considered as a freehold, not passing immediately by way of remainder, as in the former cases, but to commence *in futuro*, viz. after the death of *A.*, unless a preceding freehold during the life of *A.* had resulted to fill up the chasm, and prevent any interruption or abeyance of the freehold, by connecting itself with the limitation to *B.* as a preceding estate with a remainder.

(20)

Had the term of 3000 years been made determinable on *B.*'s life, as the term of 70 years was, this case would have fallen within the reason of the resolutions in the cases of *Napper* and *Sanders*, and of Lord *Derby*; for then as *A.*'s death must have determined both the terms; (and there could be no supposed possibility of his life's exceeding them) an estate to commence at his death would have been

Supra, 12,
13.

been the same as an estate to commence from the determination of those terms, and would consequently have amounted to a vested remainder, expectant on those terms.

I hope, I have now sufficiently explained the nature of the exceptions I have been treating of; and shall therefore pass to those cases which are to be excepted from the literal extent of the last of the foregoing descriptions. These will be found to be much more numerous, as they depend, on one hand, on a general rule of law respecting limitations to the heirs general or special, where the ancestor takes an estate of freehold in the same conveyance; and on the other, upon the respect which is paid to the intent of a testator, where it can be plainly collected from his will, that he used the words *heirs of the body*, &c. as a *descriptio personæ*.

(21)

2 Roll. Abr.
417.
1 Rep. 104.

Upon the first of these grounds we are to observe, that wherever the ancestor takes an estate of freehold, or frank-tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs, or heirs in tail, such remainder is immediately executed in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance: As an estate for life to A. remainder to the heirs of his body; this is not a contingent

1 Inst. 22. b.

contingent remainder to the *heir of the body* of *A.* but an immediate estate tail in *A.* So likewise, wherever the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards in the same gift or conveyance a limitation to his right heirs, or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, this remainder to his *heirs* vests in the ancestor as a remainder, and shall not be in contingency or abeyance. As a lease for life with divers remainders over, remainder to the right heirs of first lessee for life, this is a remainder in fee vested in the first lessee for life; and after his death, and the determination of the mean remainders, his heir shall be in as *heir*, and not as purchaser. So where land is given to *A.* for life, remainder to *B.* for life, remainder to the heirs-male of the body of *A.* who has two sons, the eldest has issue a daughter, and dies, *A.* and *B.* die, the youngest son shall have the land as heir-male; which proves that he takes by descent, and not by purchase, and consequently the estate-tail vested in the father; for had the younger son taken by purchase, he must, according to the old doctrine, have been complete heir-general as well as heir-male, which two characters could not be united in him during the life of the eldest son's daughter.

2 Roll. Abr.

417.

1 Rep. 104.

Brook, Done,
&c. pl. 11.

Brook,
Nofme, pl. 1.
40.

(22)

1 Inst. 24. b.
Vide infra,
147.

Roll

2 Roll. Abr.
418.

(23)

Vide Lit.
Rep. 258.

1 Inst. 378.
b.

Roll indeed takes a distinction, by saying, that where the frank-tenement is so limited to the ancestor, and a mediate remainder to his right heirs, that all the intermediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is in abeyance; because he can have no heir to take the remainder; as if a feoffment be made to the use of *A.* and *B.* during their joint lives, and, after the death of either of them, to the use of *C.* for life, remainder to the heirs of the body of *B.* this remainder, he says, does not attach in *B.* but is in abeyance; because if *A.* and *C.* die in the lifetime of *B.* the estate to *B.* is determined, and the remainder to *C.* ended, and yet the remainder to the heirs of *B.* cannot take effect, because he cannot have an heir during his life. And some cases have been put *arguendo* of the heir's taking by purchase, because of the impossibility of the remainder's vesting and uniting with the freehold in the ancestor's life-time; as of a limitation to *A.* for life, remainder to *B.* for life, and if *A.* dies before *B.* then to the right heirs of *A.* Or a lease to *A.* and *B.* and if *A.* dies, living *B.* the remainder to the heirs of *A.* But this doctrine is directly contradicted by the authority of lord *Coke*, where he says, if land be

be given to *A.* and *B.* so long as they jointly together live, the remainder to the right heirs of him that dieth first, and warrant the land in *formâ prædictâ*, *A.* dieth, *his heir shall have the warranty*; and yet the remainder vested not during the life of *A.*, for the death of *A.* must precede the remainder; and yet shall the heir of *A.* have the land *by descent*. And consequently it operates as a contingent remainder in *A.* himself, and not a remainder to his heirs by purchase, although it cannot possibly vest in the life-time of *A.*

And with respect to the distinction taken by *Rolle*, I am to observe that he cites no authority at all for it; and I find it is opposed by two authorities, which are expressly to the contrary: The first is in *Perkins*; if lands be leased unto *A.* and *B.* for the life of *C.* the remainder unto the right heirs of *A.*, and *A.* takes a wife, and *C.* dieth leaving *A.* and *B.*, and *A.* dieth leaving *B.*, the wife of *A.* shall be endowed; because that *cestui que vie* (*C.*) dieth, living *A.* the husband, so as the freehold and inheritance are joined in the husband during the coverture. Here we see the freehold was limited to *A.* only during the life of *C.*, so that it very probably might (and as the case is put, did) determine before the death of *A.*, but notwithstanding he could have no heir at the time when his freehold so determined by

Perk. f. 337.

the death of C., yet the freehold and inheritance, it seems, became united in him at the death of C. consequently the remainder to his right heirs was completely executed in himself by the death of C. and therefore that limitation must have been a vested remainder in its creation; for had it been a contingent estate to the heir of A. the inheritance could never have been executed or vested in A.

(24)

1 Keb. 888.
Merrel v.
Rumsey.
Raym. 126.
Siderf. 247.

Consonant to this is the other case, which is in *Keble*: an estate was limited to husband and wife during their joint lives; and after the decease of either of them, remainder to the heirs of the body of the wife begotten by the husband, remainder to the wife for life. Upon a dispute between the children and the wife, after the death of the husband, whether this was an estate-tail in the wife, or a contingent remainder in the children; *Keeling* conceived it an estate-tail, executed *sub modo*, not presently, by severance of the jointure, as it would be by a several conveyance, but upon the death of him whose life kept the estates asunder, they were united and executed; and the court agreed there was no contingency either in estate or person, and that an estate to a woman *durante viduitate*, remainder to the heirs of her body, is an estate-tail in the woman. In this case likewise, we observe, that the freehold which the wife took by the limitation

limitation was only for the joint lives of herself and husband, and consequently must determine in her life-time, if her husband should die before her; and then she could have no heir of her body when it determined: the case actually so happened; yet we find it was adjudged an estate-tail in the wife. The like observation may be made as to an estate to a woman *durante viduitate*, remainder to the heirs of her body: her freehold may determine before she may have any heir of her body; nevertheless the court held such a limitation to be an estate-tail. In the case put by *Rolle*, there is an intermediate remainder to C. for life; but the only difference to be inferred on that account (if we reason by analogy to the cases where the ancestor takes the freehold for his own life,) is, that the limitation attaches in the ancestor as a remainder, instead of being executed in possession, as it was in the latter cases which I have cited. And *Brooke* speaking of the opinion, that if land be given to A. B. *pur autre vie*, the remainder to the heirs of his body begotten, he shall have only a term *d'autre vie* during the life of *cestuique vie*, says, *tamen dicitur quod non est lex*.

(25)

Brooke, Estates, 76.

Indeed the cases where the freehold, though it may determine in the ancestor's life time, is not constrained to do so, seem in some

Brooke Done
et Remain-
der, (pl. 76.)

Vide infra
143 per tot.

1 Co. Rep.
98. a.

Vide 1 Co.
Rep. 98. b.
99. a. 8 Co.
Rep. 76. a.
Jenk. Cent.
249. pl. 40.

Vide infra
p. 286. 444.

Co. Lit. 378.
supra 23.

measure referrible to the principle resorted to by *Brooke* in the common case of a lease to one for life, with divers remainders over, remainder to the *right heirs* of first tenant for life; where he says, that if all die, the heir shall be in *as heir*, for by *possibility* his father might have *had the possession*. By which we must understand the possession *unsevered* from the limitation to his heirs; for the possession so severed he had before; and in this sense of the principle, it seems by no means foreign to the case of a freehold, which, though it may determine in the ancestor's life, may also be commensurate with it, and eventually continue unsevered from the inheritance. The principle referred to by *Brooke* is recognized in what is said in *Shelley's* case, that if the heir is to take any thing which *might* have vested in the ancestor, the heir shall be in by *descent*. And so, where an estate is to arise to the ancestor and his heirs on a condition precedent; the performance of it after the *ancestor's decease* (in whom no estate at all therefore vested), will intitle his *heir* as by *descent*. To which we may add, the rule respecting the *transmissible* quality of contingent remainders, or executory devises, to the representatives of the ancestor dying before the the estate vests. And the case cited by lord *Coke*, of the lease to two for their joint lives, remainder to the right heirs of the one

one who dies first, establishes the union of the two limitations, notwithstanding the contingency of the latter, and its absolute impossibility of vesting in the ancestor. These grounds, in conjunction with the cases I have referred to, upon the question arising on the determinable state of the freehold in the ancestor's life-time, seem to overweigh the authority in *Rolle*, and warrant the rule in *Skellie's* case, to the whole extent of its general terms.

Upon the whole therefore, the better conclusion seems to be, that the possibility of the freehold's determining in the life of the ancestor who takes it, does not keep the subsequent limitation to his heirs from attaching in himself; and that we may consider it as a general rule, that whensoever the ancestor takes any estate of freehold, whether it be or be not such as may determine in his life-time, and there is afterwards, in the same conveyance, an unconditional limitation to his right heirs or heirs in tail (either immediately, without the intervention of any mean estate of freehold, between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not

- (26) remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates.—As if there be an estate to *A.* for his life, or during the life of *C.* or any other sole estate of freehold, remainder to the heirs of the body of *A.* this is an estate-tail executed in possession in *A.*; but if there be an estate to *A.* for his life, or during the life of *C.* or any other estate of freehold, remainder to *B.* for life, remainder to the heirs of the body of *A.* this is only a present freehold in *A.* with a vested remainder to him in tail, to take effect in possession after the determination of *B.*'s estate.

And where the subsequent limitation to the heirs, or to the heirs of the body of any ancestor taking the preceding freehold, is *contingent*, according to the above cited case, of the gift to two for their joint lives, remainder to the heirs of the one dying first. As the heir still takes by descent, it seems to follow, that if the contingency on which the vesting

is to depend happen in the life-time of the ancestor, the remainder in tail will then vest in him; and that in case of its not so happening, still it attaches in him as a *contingent* remainder, which his heir can only take by descent.

And upon the same principle, a limitation to husband and wife for their lives successively, remainder to the heirs of the body of the one dying first, operates as a contingent remainder in tail, barrable even by fine, though supported by a trust, because fines of land *in any wise intailed* to the persons levying them, are a bar to the issue by stat. 32 H. 8. And accordingly a limitation of that nature has, in a settlement of customary estates, been held to put the estate in the power of the parents in a case hereafter to be noticed; and which serves to confirm the doctrine in the case put by lord Coke, that the impossibility of the limitation to the heirs &c. *vesting* in the life-time of the ancestor, is no obstacle to its attaching as a contingent remainder in him.

Vide 10 Co. Rep. 30.

Vide Highway v. Banner, *infra*, 66.

Here it is to be observed, that cases may arise, where the estate of freehold limited to the ancestor may be so limited to him, *in trust* for some *other person*, or as a *security* for some charge, or to answer some other *particular*

(27)

purpose, and no *usufructuary benefit* be intended to the ancestor by such limitation. As a limitation to the *use* of *A.* during the *life* of *B.* in trust for *B.* or to pay her the rents and profits during her life, remainder to the *use* of the *heirs of the body of A.*; and some other cases which might be put, and which, tho' I don't recollect to have met with in our books, have occasionally occurred to me in the course of practice. Now these are cases which, I don't see, how we are to consider as falling within the extent or application of the rule I have been treating of; because it seems absurd and inconsistent with any possible rule of law or common sense, to create or raise an estate-tail to a man upon the ground of a limitation (*viz.* the freehold limited *in trust*) by which *no beneficial interest at all* was intended him.

When there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance in fee-simple to them, as an estate to *A.* and *B.* or for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the *same quality*, that is both joint, it seems the fee vests in them jointly. And so if the limitation of the freehold be to baron and feme jointly, remainder to the *heirs of their bodies*, it is an estate tail executed in them, as they are capable of issue, to whom

Vide 1 Inst.
183 b. 184,

Brook Estate,
pl. 75.

whom such joint inheritance can descend. But if the limitation of the freehold be not joint, but *successively*, as to one for life, remainder to the other for life, remainder to the heirs of their bodies; there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail. And if the limitation of the inheritance be to several men, or to several women *in tail*, instead of fee-simple, though the freehold be to them *jointly*, they take several estates of inheritance; because they cannot have issue between or among them as a man and woman may. And the same rule extends to other cases, where the relative situations of the grantees, renders the possibility of issue between or among them more remote, than what is termed a simple or common possibility, or else is inconsistent with the laws of marriage.

1 Lev. 36.
Raym. 36.
Stephens v.
Bretridge.

1 Inst. 182—
184.

If the particular estate be to *A.* and *B.* for their lives, and after their deaths to the heirs of *B.*; or to husband and wife, and the heirs of the body of the husband; or to two men, and the heirs of their two bodies, or the heirs of the body of one of them. The estates in tail or in fee are said to be executed *sub modo*; that is to some purposes, though not to all. For though they are so far executed in, or blended with the possession, as not to be grantable away from or without the freehold by

1 Inst. 182.
b.
2 Co. Rep.
61. a.
Cro. Eliz.,
470.
Dy. 9. pl. 12.
Perk. f. 334.
337. and
Merrel v.
Rumsey, *supra*, fol. 24.

3 Co. Rep. 5.
Moor, 210.
Owen's Case.

Ring v. Ed-
wards, Cro.
Car. 320.

by way of *remainder*; yet they are not so executed in possession as to sever the jointure, or intitle the wife of the person so taking the inheritance to dower; and in the said case of a limitation to husband and wife, and the heirs of the body of the husband, his wife having a joint estate of freehold with him, and there being no moieties between them, a recovery against him with single voucher will not bar the issue or remainder; though his estate tail has been held to be so executed in possession, that his feoffment was a discontinuance.

(28)

11 Rep. 80.
Lewis
Howles's
Case.

The general rule of law, respecting the subsequent limitation to the heirs of the body, &c. vesting in the ancestor, where he takes a preceding freehold by the same conveyance, does not operate so as absolutely to merge the particular estate of freehold, where the limitations intervening between the preceding freehold, and such subsequent limitation to the heirs, &c. are contingent; because that would destroy such *intervening* limitations; but the two limitations are united and executed in the ancestor, only until such time as the intervening limitations become vested; and then open and become separated, in order to admit such *intervening* limitations as they arise. Thus, where there was a limitation to *baron* and *feme* for their lives, remainder to the first and other sons of the marriage

marriage successively in tail, remainder to the heirs-male of the bodies of the *baron* and *feme*; the court resolved that it was an estate-tail executed in the *baron* and *feme*, *sub modo*; that is, so as not to merge the estates for life absolutely, but executed only till the birth of the first son; and that then the estates should become divided by operation of law, and the *baron* and *feme* become tenants for their lives, with remainder to their first and other sons, remainder to *baron* and *feme* in tail.

In this last case, we observe, that the limitation of the freehold was a *joint* limitation to husband and wife; and the subsequent limitation to the heirs of their bodies became united to it, and *quodam modo* executed in them *jointly*; because that subsequent limitation was of the same quality with the first, that is, a *joint* limitation. Just as the above noticed case of a limitation to *baron* and *feme* for their lives and the life of the survivor of them, and afterwards to the heirs of their bodies, is an estate-tail executed in them; *both* limitations being *joint*, and therefore essentially different from the case where the limitation was to *baron* for life, *remainder* to *wife* for life, remainder to the heirs of their bodies; in which the limitation to their heirs being a *joint* limitation to them, did not correspond with the quality of their estates for life, which were

Vide Roe v.
Aistrop, in-
fra, p. 46.

Supra, 27.

(29)

Vide Stone
v. Sutton,
infra, p. 44.

were distinct and successive, and consequently gave them several estates for life, with a joint remainder in tail.

2 Roll. Abr.
p. 417. H.
pl. 1, 2.
Dy. 99. 64.
1 Leon. 102.

If there be a limitation to the *feme* for life, remainder to the heirs of the body of *baron* and *feme*, this is no remainder in the *feme*, for the freehold is limited to her alone; and as the person who is to take in remainder must be heir of both their bodies, if the *feme* should die before the *baron*, there can be no one to answer that description when the particular estate determines, because the *baron* cannot have an heir during his life, nor could it be involved or flow into the limitation to the *feme* herself, as not being confined to her own heirs; therefore the remainder is in contingency. And the same doctrine prevailed in two other cases, that I shall take occasion to cite more particularly by and by, in which it was held, that a similar limitation was a contingent remainder to the *heirs* of *both* the bodies of husband and wife.

Vide Lane v.
Pannel, and
Frogmorton
v. Wharrey,
infra, 46, 47.

Stiles's Rep.
325. Goffage
v. Taylor.
Vide Yelv.
131.

(30)

So in the case of *Goffage v. Taylor*, where an estate for life was limited (but *Q?* and consider the case) to *S.* wife of *L.* remainder to the heirs to be begotten upon the body of *S.* by *L.* her husband, no estate being previously limited to the husband himself; it was held that the word *heirs* related to both their bodies,

bodies, and consequently did not create an estate-tail in S.

We are to distinguish between cases of the last mentioned class, and those above noticed, where the limitation to *the heirs &c.* is held to vest, notwithstanding the ancestor's freehold may determine in his life-time; the limitation there is to the *heirs of the body*, of the ancestor only, but here it is to the heirs of the body of the ancestor and of her *baron*; and though every person may so far be supposed to carry his own heirs &c. in himself during his life, as that a limitation to them where he takes a preceding freehold may vest in himself; yet no person can be supposed to include in himself the heirs &c. of himself and of somebody else.

Vide Co. Lit.
22, b.

The reference of the word *heirs*, in the last noticed case, to the bodies of both the husband and wife, corresponds with the decision in a very late case; where upon a marriage the husband covenanted to stand seised of lands to the use of himself and his intended wife for their lives, and the life of the longer liver, remainder to the use of the *heirs on the body of his said intended wife BY him lawfully to be begotten*, remainder to the use of his own right heirs. The husband having survived the wife, levied a fine of the lands; and after his

Denn v.
Gillott, 2
Durnf. and
East. Rep.
431.

his decease, a question arose upon the operation of this fine; which depended on the point, whether the words *to the use of the heirs on the body of the wife by the husband to be begotten*, gave an estate-tail only to the wife, or a joint estate-tail to both. And it was decided, that the limitation gave an estate-tail *to both*; upon the authority of the last above cited case, and others hereafter noticed, as well as of the case cited by lord Coke, from 3 Ed. 3. c. 32. where, upon a gift to *J. and M. uxori ejus et heredibus quos idem I. de corpore ipsius M. procrearet*, &c. it was adjudged an estate-tail *in both*, because the estate was equally intailed to the heirs of the baron as to the heirs of the wife.

Co. Lit. 26.

Vide Co. Lit.
26.

We may observe, that in the two last cases the *heirs* were not expressed to be *of* the body of either parent; but heirs *upon* or *on* the body of the one *by* the other, and therefore applied equally to them both. And however light or frivolous the distinction in these cases between the word *of*, and the words *on* or *by* may now appear; yet it having originally, upon principles now obsolete, obtained ground in judicial decisions, the court held themselves bound to observe it in the case last noticed. The same distinction was particularly relied on in a case there referred to; where, upon a feoffment to the use of *R.* and his wife for their lives, remainder to the use of the first, second,

Peps v. Bonham, Yelv.
131.

second, and third son of the body of the wife, and afterwards to the heirs of the body of the wife by R. to be begotten, it was held that the inheritance was only in the wife; because the word *heirs*, which made the inheritance, was annexed only to the body of the wife; but that if it had been to the heirs, *which the husband should beget on the body of the wife*, it would have been an estate-tail in them *both*,

and vide Lit. sec. 26, 27, 28, 29. Vide Harg. note 3. Co. Lit. 26. b.

In the case of a limitation to A. for life, the remainder to the right heirs of him and of B. (B. being alive at the time) it was thought to be executed for a moiety; for that if A. had not had a particular estate limited to him, his right heir, and the heir of B. would have had it in common; and he should not have the whole, on account of the other not being capable, as it was not limited to him.

2 Rol. Abr. 417. pl. 6.

But here we are to notice a distinction, between a limitation to the *right heirs* of *husband and wife*, who may have a common heir between them; and one to the right heirs of two other persons.

Thus in the case of a devise, in remainder to the right heirs of W. and M. his wife for ever, without any antecedent estate to either of them. The wife died, leaving a daughter by W.; he married again, and left a daughter by

Roe v. Quartley, 1 Durnf. and East. Rep. 630.

Vide infra
239.

by his second wife; and upon a dispute between the two daughters, it was argued that the description of right *heirs of W. and his wife* must either mean the *heirs of the survivor*, or give the estate in moieties between the *heirs of each*. But the court held the devise to operate in the same manner as if it had been to the right *heir of the body of W. and M.* That it was to be collected from *Co. Lit.* 107. that a grant to *husband and wife* was not considered in the same light as a grant to *other persons*; for that if a joint estate be made to husband and wife, and a third person, the husband and wife have but *one moiety*; and the third person will have as much as them both; because the husband and wife are but one person in law. If then they were but one person by reason of the relation they stood in, a limitation to *their heirs*, without any prior limitation to themselves, must naturally mean *heirs to them both*, according to that relation, which could only be *children of them both*.

Mandevile's
Case, Co.
Lit. 26. b.

A limitation to a *woman and the heirs of her late husband* (then dead) *on her body begotten*, was adjudged to give her no more than an estate for life. And it was held that a fee-tail vested in her son by her late husband; and that on his death, without issue, it descended on his sister (daughter of

of the same parents) as heir of the body of her father, *per formam doni*.

It seems immaterial, with respect to the operation of the general rule respecting the limitation to the heirs &c. attaching in the ancestor, whether the ancestor takes the freehold by *express* limitation or by *implication*; in either case the subsequent remainder to the heirs of his body &c. equally unites with it. As in a case of frequent reference, where *A.* seised in fee, covenanted to stand seised to the use of *his heirs-male begotten or to be begotten, on the body of his second wife*; it was, upon the principle laid down by lord Coke, 1 *Inst.* 23. *a.* that so much of the use as the owner of the land does not dispose of, remains in him, held, by Hale C. J. and two other judges, that *A.* took an estate for his own life by implication; the use during his life being undisposed of. And it was held, that the subsequent limitation to his *heirs-male &c.* was executed on the estate for life which he had by *implication*, and created an estate-tail in *A.*

Pibus v.
Mitford,
1 Vent. 372.

(31)

In *Pibus v. Mitford* there was no limitation of the use during the covenantor's life. But there have been cases containing an express limitation of the *immediate use*. And where it has been limited away for years only,

Vide p. 17,
supra.

and no use limited of the freehold till the grantor's death, the use of the freehold, as *undisposed of till that period*, seemed to fall within the doctrine of resulting interests. And accordingly in the case of *Penbay v. Hurrell*, cited in a former page, Lord Keeper, after much consideration, and a case stated to the Judges, gave his opinion, that *A.* had an estate for life by implication; and so all the limitations over were good, there being a freehold to support them. Which determination appears to have proceeded upon the strength of Lord *Coke's* opinion, 1 *Inst.* 23. *a.* and the concurrent authority of Lord Chief Justice *Hale's* opinion, in the case of *Pibus v. Mitford* before cited, that as well in a fine or feoffment, as in a covenant to stand seised to uses, so much of the use as a man does not limit away remains in him.

Vide p. 30,
supra.

Adams v.
Savage,
2 Salk. 679.

And vide
Dyer 111.
in margin.

In a subsequent case where the use was limited to the grantor himself for 99 years, remainder to the use of the trustees for 25 years, remainder to (the use of) *the heirs-male of his own body*, remainder to his own right heirs. The court held the limitation to the *heirs-male* of the body to be void, because there was no preceding freehold limited to support it, and that it should not be implied *contrary to the intent* of the conveyance; that there the estate took effect by transmutation

tion of possession out of the seisin of the trustees, and not like *Fenwick* (should be *Pibus*) and *Mitford's* case, where the owner covenanted to stand seised to the use of the heirs of his body; and *Powel* Justice held that even in that case, if there had been an *express estate limited to the covenantor*, it had been different.

And so where *A.* by marriage settlement conveyed certain lands to the use of himself for 99 years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of the *heirs-male of his own body*, remainder to his own right heirs. Upon a case referred to the Judges of *C. B.* from the Court of Chancery, they held the limitation to the *heirs-male of the body of A.* void, no freehold being limited to any person precedent to that estate; and that no estate of freehold could *result to A.* for his life by *implication*, because another estate, *viz.* for 99 years if *Ec.* was expressly limited to him, which would be inconsistent with a freehold by *implication*.

Rawley v. Holland,
Vin. v. 22.
p. 189.
c. 11.
2 Eq. Abr.
753.

And where the use was expressly limited away *during the life* of the grantor instead of for years only, it has been held, that the freehold could not result to him, so as to unite with the subsequent limitation to the heirs of his body.

(32)

Tippin v.
Cofin.
Carth. 272.
4 Mod. 380.

infra (33)
Moor, 284.

Thus where *E. C.* on his intended marriage, settled lands by deed and fine, to the use of himself and his heirs till the marriage, and afterwards to the use of his wife for life, remainder to the use of the cognizees in the fine and their heirs *during the life of E. C.* upon trust to permit him to receive the rents and profits, remainder to the sons of the marriage successively in tail-male, and for want of such issue to the *heirs of the body* of the said *E. C.* and for want of such issue to the said *E. C.* and his heirs. It was agreed that the case differed from that of *Fenwick v. Mitford*, for there, no use at all was limited *for the life of the feoffor*, which left a vacancy the law would supply by implication; but in the principal case there being an express estate limited to the cognizees *during the life of E. C.* there was no room left for any implication. Besides that in *Mitford's* case, it was held to be no other than the *old reversion* subsisting in the feoffor; but the limitation in the principal case being of a new estate, *viz. an estate-tail*, could not be any part of the old estate, which was a fee-simple. And though it was contended, that the law would imply an estate for life in *E. C.* intermediate between the estate of the cognizees and that to the first son of the marriage, because it was possible that the cognizees might forfeit or surrender; yet the whole court was clearly of opinion that

that the limitation to the heirs of the body of *E. C.* was a *contingent remainder*, and such as the heir would take by *purchase*, and not by descent; and that the case differed from that of *Fenwick v. Mitford* for the reasons before given. And judgment was given accordingly.

So where *A.* made a settlement to the use of himself for 99 years, if he should so long live, remainder to trustees and their heirs *during his life, &c.* remainder to the use of the *heirs of his body*; remainder to himself in fee. Lord Chancellor *Cowper* held this limitation to the heirs of the body to be plainly a contingent remainder,

1 P.W. 387.
Elfe v.
Osborne.

And in a case where *A.* having two sons *C.* and *D.* covenanted to stand seised to the use of *C.* and the heirs-male of his body on *M.* his wife to be begotten, and for want of such issue to the heirs-male of his (*A.*'s) own body, and for want of such issue to his own right heirs for ever; *C.* the eldest son died, leaving issue one son and several daughters, *A.* died, and then the son of *C.* died without issue. The court held the limitation to the heirs of the body of *A.* to be words of *purchase*, and to vest in the son of *C.* upon the death of *A.* as *heir male* of his body by *purchase*; and that on the death of *C.*'s son it

Southcot v.
Stowell.
1 Mod. 226.
237.
2 Mod. 207.
211.

(33)

Vide *Man-*
devile's case,
Co Lit. 26.
b. *supra*, 30.

E 3

descended

descended to his uncle *D.* as heir-male of the body of *A.* *per formam doni*; and not by purchase as heir-male of the body of *A.* he not being heir, as his nieces were living. They allowed no estate for life in *A.* by implication, and seemed to doubt the doctrine in the case of *Pibus* and *Mitford*. But this difference is observable between the two cases; in that of *Pibus* and *Mitford* the covenantor had not limited any use at all *during his own life*; whereas, in *Southcot v. Stowell*, the covenantor had limited a *present use* to his son *C.* in tail.

But notwithstanding the disinclination of the court in the case of *Southcot v. Stowell*, to admit a *resulting use* to the grantor, or allow a person to take as *special heir by purchase*, if not also *complete heir*; a contrary doctrine has been since established in respect to both these points, in a late case which has carried the implication of a resulting use to a grantor, a step beyond the limits of the question in the cases of *Pibus* and *Mitford*, and *Penbay* and *Hurrell*; though I think equally within the extent of the same principle.

supra 30 &
17.

Wills et al'.
v. Palmer,
5 Bur. 2615.
2 Black. Rep.
687.

The case in substance was this, *Archdale Palmer* and his son *John Palmer*, upon the marriage of the son with *A.* settled certain lands to the use of *Archdale* and his heirs until
the

the marriage ; and afterwards, as to part of the lands to the use of *John Palmer* for life, and after intermediate remainders, (to the use of his wife for life and of his sons by her or any other woman successively in tail-male,) to the use of the heirs-male of the body of the said *Archdale Palmer*, remainder to the use of the heirs of the body of *John Palmer*, remainder to the use of *John Palmer* his heirs and assigns ; and as to the residue of the lands to the use of *Archdale* for life, and after several intermediate limitations, (to the use of *John* for life and to his wife, in part, for life and of the sons of the marriage successively in tail male), to the use of *John* and the heirs male of his body, remainder to the use of *Archdale*, his heirs and assigns.

John died without issue male in the lifetime of his father, leaving *A.* his widow and one daughter by her named *Ann.* *Archdale* afterwards by his will, noticing that by the death of his eldest son *John* without issue male, that part of his estate then in his possession was, by the said marriage settlement, vested in him in fee-simple, devised the said estate to his son *William Palmer* for life, with remainder to his sons successively in tail male, and for want of such issue, to the heirs male of his (testator's) body begotten, and for want of such issue to his own right heirs for ever.

Archdale died, leaving his said grand-daughter *Ann* his heir at law, and his son *William Palmer* (who as well as *John* his deceased brother) was the testator's issue by a first wife, and also leaving *Henry*, an eldest son and several other children, by his second wife.

Afterwards *William Palmer*, who at his father's death was *heir male of his body*, died, leaving a son, who died leaving a son *Henry John*, who died an infant without issue; and no recovery was suffered by *William* or his son.

Upon the death of *Henry John*, *Henry* the then eldest son and heir male of the body of *Archdale* by his second wife, entered upon that part of the estate which was by *Archdale's* will devised to the *heirs male* of his body.

And afterwards, upon the death of *Ann* the widow of *John*, *Henry* took possession, as *heir male of the body of Archdale*, of the lands which she had held for her life under the settlement.

Upon a bill filed by *Ann* the daughter of *John*, and heir general of *Archdale* and her husband, claiming in her right, as *heir at law and heir of the body of John Palmer*, to be intitled,
on

on failure of issue male of the whole blood, to that part of the estate which was limited by the settlement to *John Palmer* in fee ; and also claiming in her right, as *heir at law of Archdale*, to be intitled to the estates of which the reversion in fee was limited to him by the settlement, as not devised by his will ; a case was made for the opinion of the judges of the king's bench, upon the question

Whether any and what estate passed by the settlement to the defendant *Henry Palmer*, as *heir male* of the body of *Archdale Palmer* the grantor ? And whether any, and what estate passed to the said defendant *Henry Palmer* as *heir male* of the body of the said *Archdale Palmer*, by his will ?

Upon which the judges certified they were of opinion, that the defendant *Henry Palmer*, by the settlement, took *by descent* as *heir male of the body* of *Archdale Palmer* the grantor. That in case a *third person* had been the grantor, they should have thought that *Henry Palmer* would have taken an estate in tail male *by purchase*, under the description of *heir male of Archdale Palmer*.

And that they were of opinion, that an estate in tail male passed to the defendant
Henry

Henry Palmer, as heir male of the body of Archdale Palmer by his will.

It is evident from the above question and certificate, that it appeared as well to the court of King's Bench as of Chancery, that *Archdale Palmer* was the grantor, or at least to be considered in that light, both the question and certificate styling him such.

But there was no suspense of the express use in this case till the decease of the grantor, any more than there was in the case of *Southcot v. Stowell*; for it was limited to *John Palmer* immediately from the marriage, and yet it was held that *Henry* (who was the heir male of the body of the grantor, at the decease of *Ann* the widow of *John*, when the limitations preceding that to the heirs male of the body of the grantor determined) took by descent, that is, in the strict legal sense, by descent from *Archdale Palmer* the grantor. This conclusion is fixed by the distinction taken in the certificate itself, betwixt his taking, as it stated he did, by descent, and his taking, as it stated he would have done, by purchase, in case a third person had been the grantor.

I advert to those words as fixing the sense of the word *descent*, because as *Henry Palmer* was
not

not heir male of the body of *Archdale* at the time of *Archdale's* decease, the expression, that *Henry* took by *descent*, does not of itself seem necessarily to decide that the limitation in the settlement operated to vest the estate tail in *Archdale*. For supposing that limitation to have given the estate tail to the heir male of the body of *Archdale* by purchase under that description, it would have vested in *William*, who at *Archdale's* decease, was the heir male of his body; and being not to determine till failure of heirs male of the body of *Archdale*, possibly it might have been said to descend upon failure of *William's* issue male to *Henry*, then heir male of the body of *Archdale*, as heir *per formam doni*. According to the principle on which the court decided the case of *Southcott v. Stowell*, and the doctrine in *Mandevile's* case cited above, where though the estate tail first vested in *Robert* as heir of the body of his father by purchase, yet it devolved from him to his sister *Maud*, and in the formedon, under which she recovered, was said to descend to her; and according to Lord *Hale* would equally have done so, though she had been of the half blood; for half blood is no impediment to the descent or succession of an estate tail through a tenant in tail to his collateral relation, answering the description of heir *per formam doni*. And though such a devolution is not strictly a descent,

Vide *supra*,
30, *infra*,
57.

Harg. note,
3 Co. Lit.
26. b.

and vide the
word so used
by the court,
2 Mod. 21.

Vide infra,
P. 57.

Vide infra,
146.

descent, yet the allowed application of that word to it in *pleading*, might have left the application of it not quite certain, had not the distinction been noticed between *Henry's* taking by descent as heir male of the body of the *grantor*, and his taking by *purchase* in case a *third person* had been the *grantor*; which clearly ascertains, that the word *descent* in the certificate was intended in its strict technical sense, and meant that *Henry* took by descent an estate first vested in *Archdale*. The opinion that *Henry* would have taken an estate tail male by *purchase*, if a *third person* had been the grantor, affirms the doctrine that a person may take as *special heir* by *purchase* without at the same time filling the character of *heir general*: which is confirmed by the close of the certificate, that an estate tail male passed to *Henry*, as *heir male* of the body of *Archdale*, by his will.

The limitation to the use of the heirs male of the body of *Archdale Palmer* vesting an estate tail in himself, the use must have resulted to or remained in himself for life; but this could not be an *immediate* estate for life, but an estate in *remainder* expectant on the determination of the uses which preceded the limitation to the heirs male of his body.

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The cases of *Pibus v. Mitford* and *Penbay v. Hurrell*, admitted the *immediate use* to result to the grantor for life by implication where *no use* of the *freehold* was limited to take effect *till after his decease*. The case of *Wills v. Palmer* goes a step further on the same principle, and implies the use for life in the grantor, *in remainder* after uses that commenced and *might determine* in his life-time.

The inference therefore afforded by the several cases seems to be, that when the use is not limited away *during the whole life of the grantor*, and there is a use limited which cannot commence *till after his decease* (as is the case of a limitation to the heirs of his body, taken by itself); whether that use be limited in the first instance (as in *Pibus v. Mitford*) Supra, 30. or be preceded by limitations for terms of years (as in *Penbay v. Hurrell*) or by uses of Supra, 17. the freehold or inheritance that may *determine in the grantor's life-time* (as in *Wills v. Palmer*) the use results to the grantor *for life*; *immediately* in the first case, and *in remainder* expectant on the preceding uses in the other; where there is no express use limited to the grantor himself, inconsistent with such an implication.

This

This conclusion, indeed, flows from the above noticed rule laid down by Lord Coke, that in a conveyance to uses without valuable consideration, so much of the use as is *not disposed of* remains in the grantor. For it is evident that the use *of the present freehold*, where no use at all, or a use for term of years only is limited to commence before the grantor's decease, *is not disposed of*; and that where the use is limited immediately, for estates that *may determine in the grantor's life*, followed by a limitation that *cannot take effect till after his decease*, the intermediate use *in remainder for his life*, is not disposed of; for suppose the preceding use to determine in his life-time, where then is *the use* during his life, if not in himself?

There is nothing however in Lord Coke's position, *nor* in the circumstances of the case of *Wills v. Palmer* that applies to those cases, where the use is expressly limited away *for the grantor's life*; nor contravenes the doctrine in *Tippin v. Coffin* above cited, or the opinion of the Lord Chancellor Cowper in *Else v. Osborne*.—And to extend the principle to cases where an express estate for years is limited to the grantor, as in *Adams v. Savage*, and *Rawley v. Holland*, though the use of the *freehold* is not limited away till after the grantor's decease,

• Supra, 32.

Supra, 31.

cease, would be admitting or raising an estate by *implication*, in direct contradiction to, and denial of, an *express* estate; which is not reconcilable to the idea of implication.

No estate for life can arise by implication, or by way of resulting use, to a person who was not the owner of the estate granted. As where husband and wife levied a fine of the wife's land to the use of the *heirs of the body of the husband on the wife begotten, and for default of such issue to the use of the right heirs of the husband*; they had issue; the wife died, then the issue died, and then the husband died; and the question was, whether the heir of the husband or the heir of the wife should have the lands? And the court held, that no estate for life could arise to the husband by *implication*, because the estate was the wife's, to which he was a stranger; therefore the limitation to the heirs of the husband, &c. was void, for want of a preceding freehold to support it. An implied estate in the wife for her life would not do as she died before her husband, and consequently before the remainder to his heir could commence.

2 Salk. 675.
Davies v.
Speed,
Show. Cas.
Parl. 104.

Vide same
case *infra*,
p. 210, with
some further
observations
upon it.

So where a marriage settlement was made by a *third person* to the use of *A.* the husband for 99 years, remainder to trustees *during his life* to support contingent remainders, remainder

Vide 1 P. W.
359, Sir T.
Tippin's case
there cited,
and vide
Jenk. Cent.
248, c. 18.

mainder to the wife for life, remainder to the first &c. son of the marriage, remainder to the *heirs of the body* of *A.* remainder to his *right heirs*; here the freehold *during A.'s life* being limited to trustees, and he taking only a term of years, and the estate not moving from him (for if it had, the limitation to his *right heirs* would have been the old reversion) the remainder to his *heirs* was a *contingent remainder*.

And in a case more fully cited in the sequel of this essay, where lands were devised to *C.* for the term of 90 years if he should so long live, and afterwards to the heirs of *C.'s* body, it was held that it vested in the heir by purchase.

Harris v.
Barnes, *infra*,
430. 4 Burr.
2157.

Indeed in a case where the testator devised in remainder (after limitations to his brother *W.* and his heirs males) to the *heirs males* of his brother *N.'s* sons (who then had two sons living) without any antecedent devise to those *sons themselves*, and by a schedule annexed to the will and referred to in it (and which the special verdict found to be part of the will) purporting to be an account how the testator had disposed of his estates by his will, he said, and for want of his brother *W.'s* having sons, then *to his brother N.'s sons*, and for want of sons then over. Upon the question, whether

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Hayes v.
Foorde,
2 Black. Rep.
698.

one of the sons of *N.* took an estate for life or in tail, the court of king's bench in *Ireland* held he took only *for life*. But on an appeal to the king's bench in *England*, Lord *Mansfield* in delivering the opinion of the court, observed that the only doubt was, whether by the words of the will the *sons of N.* took any estate by implication; that such doubt was removed by the schedule, which expressly gave an estate to the *sons of N.* and therefore the son of *N.* took an estate for life by implication *thus explained*, which being conjoined with the estate expressly given to his *heirs males*, by the will, would by the known rule of law give him an estate in tail male.—But this case turned on the operation of the schedule.

Again, in a case cited in a preceding page, the devise to the *right heirs* of husband and wife was adjudged to operate as a devise to the person who was heir of the husband and wife as a *purchaser*, because there was no estate at all limited to the husband or wife.

And wherever the ancestor takes only an estate for years, *another person* being the grantor, the remainder to his heirs or heirs of his body &c. will not vest in himself, but in the *heirs by purchase*. As in the case of a lease for years to *A.* remainder to *B.* in tail, re-

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mainder

Roe on the demise of Nightingale v. Quartley, supra, 30.

Vide Co. Lit. 319, b. and Sir T. Tippen's case, supra (33) And Hal. MSS. Harg. n. 4 Co. Lit. a b.

mainder to the right heirs of *A.* the heirs take by purchase, if *A.* die during the estate tail.

But a limitation to the *right heirs* of the grantor, will continue in himself as the *reversion* in fee. As where a fine was levied to the use of the wife of the conusor for life, remainder to the use of *B.* in tail, remainder to the use of the *right heirs* of the conusor; it was adjudged that the limitation of the use to the *right heirs* of the conusor was void, for that the old use of the fee continued in him as a reversion.

Fenwick v.
Mitford,
Moor 284.
1 Inst. 22, b.
1 Leon. 182.

Moor 718.
Earl of Bedford's case.
Vide also
Jenk. Cent.
248. 2
Rep. 91, b.
Cro. Eliz.
334, and
Hal. MSS.
Harg. n. 3.
Co. Lit. 22,
b.

So where *A.* infeoffed *J. S.* and *J. N.* in fee, to the use of himself for 40 years, without impeachment of waste during the life of *A.* and afterwards to the use of *C.* second son of *A.* in tail male, remainder to the use of the *right heirs* of *A.* for ever; it was resolved, that the use limited to the *right heirs* of *A.* was the old use; that it was void as a remainder, and was merely the reversion in *A.*

Reade and
Morpeth v.
Brington,
Cro. Eliz.
321.

And where *A.* seised in fee conveyed the lands to the use of *J.* and *M.* his wife, and of the heirs male of the body of *J.* and afterwards to the use of the *right heirs* of the said *A.*; upon a question, whether the remainder limited to the use of the *right heirs* of *A.* in the lands in which he had *no particular estate*,

was

was in him as his old *reversion*, or vested in his heir by *purchase*; it was the clear resolution of the whole court, that this use so limited to *A.*'s right heirs, was the *old use*, and continued in *A.* as the *reversion*.

It follows that an express limitation of the use away *during the life of the grantor*, will not make his *right heirs* purchasers, it being his old use undisposed of. Therefore in the case of Sir *T. Tippen* before cited, though the first limitation to the husband was only for years and then to trustees *during his life*, yet, if the estate had moved from him, the limitation to his *right heirs* would have been his old reversion, as stated in the report referred to. Consequently, this difference is to be observed, between a subsequent limitation to the use of the *heirs special* and one to the use of the *heirs general*, in cases where the freehold is limited away from the grantor *during his life*; the ^{latter} ~~former~~ we have seen, leaves the old use in himself by way of *reversion*; but the ^{former} ~~latter~~ is a contingent remainder to his *heirs special*.— That is, where the limitation is by way of *use*; for by a conveyance *at common law*, the limitation to the heirs special of the grantor would be void; because a donor cannot make his own heir a *purchaser*, even of an *estate tail*, without *departing* with the whole fee.

Vide 1 P. W.
359. Sir T.
Tippen's
Case.

Vide Tippen
v. C. fin, and
Else v. Of-
borne, *supra*,
P. 32.

Vid. 1 Inst.
22. b.

(34)

*See Pearce's
Posthumous
363.*

I shall now proceed to observe, that where the estate limited to the ancestor, is merely an *equitable* or *trust* estate, and that to his heirs &c. carries the *legal* estate; they will not incorporate into an estate of inheritance in the ancestor; as (in general) would have been the case, if they had been both of one quality, that is, *both* legal, or *both* equitable.

Tippen v.
Cofin, supra,
p. 32.

As in the case of *Tippen v. Cofin* above cited, where the estate was limited *to the use of trustees* and their heirs, *during the life of E. C.* upon trust to permit and suffer him to take the profits, remainder to the first and other sons of the marriage &c. remainder *to (the use of) the heirs of the body of E. C.* tho' it was contended, that the limitation of the profits to *E. C.* during his life, was an estate executed in him by the statute, yet, the court denied that; and adjudged that the limitation to the heirs of the body of *A.* operated as a contingent remainder.

(35)

1 Eq. Abr.
383, c. 4.
Vin. vol. 8.
fol. 262,
cas. 19.
Lady Jones
v. Lord Say
and Seal, L.
Bro. Cas.
Parl. 458.

And again, where a testatrix devised certain real estates to trustees and their heirs, upon trust and in confidence, in the first place, out of the rents and profits thereof to pay the several legacies, devises and bequests therein-after-mentioned, and then, (after giving several annuities for life,) she appointed her trustees to pay all the rest and residue of the rents

rents and profits of the premisses to the proper hands of her daughter C. F. or as she by any writing &c. should appoint, for and during the term of her natural life; and after her (the said daughter's) decease, the trustees to stand seised of the premisses to the use of the heirs of the body of her said daughter C. F. severally and successively as they should happen to be in priority of birth and seniority of age, and the heirs of their respective bodies in tail-general, subject to the payment of the several annuities. And in case of failure of the issue of the body of her said daughter C. F. then to the use of Lady J. After the decease of the testatrix, C. F. and her husband suffered a recovery of the lands, and she afterwards died without issue; upon her decease Lady J. claimed the lands under the will, by virtue of the remainder thereby limited to her.

(36)

It was contended for the plaintiff (Lady J.) that C. F. took only a *trust*-estate for life by the will, with a contingent remainder to the heirs of her body in tail-general; that the direction to the trustees to pay the residue of the rents &c. to the proper hands of C. F. who was a married woman, gave her a mere *trust*, and not a *use* executed by the statute. It was a trust for her *separate use*, and to construe it an use executed, would be to subject it to the power and controul of her

(37) husband. That the subsequent limitation to the heirs of her body severally &c. was a *use* executed by the statute, and could not be consolidated with the precedent *trust* limited to C. F. for life, so as to create an estate-tail in her. That the subsequent words, *in case of failure of issue of the body of C. F. then to Lady J. &c.* did not create an estate-tail in C. F. by implication, nor enlarge the precedent estate, because no *legal* estate vested in C. F. — On the other side, it was contended, that the *legal* estate passed to the trustees and their heirs; and if it passed *in fee*, then all the subsequent uses were *uses upon a use*, and consequently *trusts* not executed by the statute; and if the estate given to C. F. for life, and the subsequent limitation to the *heirs of her body*, were *both trusts*, they might be consolidated together, and create an equitable estate-tail; and that in this case, either *both* the estates were executed, or *neither*.

But Lord Chancellor King was of opinion, that by the words of the will the *use* was executed in the trustees and their heirs *during the life of C. F.* and that she had only a *trust* in the surplus of the rents and profits during her life; but that by the subsequent words, *viz. that the trustees should stand seised to the use of the heirs of the body of C. F. subject to the payment of the annuities &c.* the use was executed
in

in the persons intitled to take by virtue thereof, chargeable with the payment of the annuities; and therefore there being only a *trust-estate* in the ancestor, and an *use executed* in the heirs of her body, those different interests could not unite, so as to create an estate-tail by operation of law in the ancestor; and he decreed accordingly for the plaintiff.

There was another case before Lord Hardwicke, which from its alliance to the above in respect of the construction upon a *trust*, for what is stiled the *separate use* of a feme covert, may, I think, without impropriety be introduced in this place; though otherwise I should rather arrange it in that class of cases, wherein the Court of Chancery has assumed a latitude of construction in the *execution of trusts*, beyond the limits generally admitted in other cases; and held the rule, that unites the estate of freehold in the ancestor with the subsequent limitation to the heirs of the body, controlable by arguments of intention, that would not have been allowed the same effect in respect to *legal* estates. Of which cases I shall have occasion to treat hereafter.

Vide infra,
p. 61, & seq.

The case I am now speaking of, was a devise to trustees to convey to *the use* of the testator's daughter, for the term of her natural life, and so as she alone or such person as she

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should

Roberts v.
Dixwell,
1 Atk. 607.

should appoint, should take and receive the rents and profits thereof, and so as her husband was not to intermeddle therewith; and from and after her decease in trust for the *heirs of the body* of the said daughter for ever.

Vide *Garth v. Baldwin*,
infra, 91.

The principal question is stated to have been, whether the trust *was executed or executory*? for that if *executed* the daughter was then tenant in tail and her husband intitled by the curtesy; the contrary if *executory* only.

Vide *Pitt v. Jackson*, *infra*, 40.

Lord *Hardwicke* considered the trust as *executory*, that the whole direction fell upon the court, and they were to direct how the parties were to convey. That the court had taken much greater liberties in the construction of *executory trusts* than where the trusts were actually *executed*, and the point which had governed them had been the *intention* of the testator. That if the wife had been intitled to an estate-tail, the husband must have been intitled to be *tenant by the curtesy*. Notwithstanding the court by their authority, might have prevented the husband from meddling with the rents and profits during the life of the wife. That as it was plainly the intention of the testator that the husband should have no manner of benefit from the estate either in the life-time of the wife or after her decease,

decease, (for immediately upon the decease of the wife it was to be *conveyed in trust* for the *heirs of her body*) the husband of consequence was absolutely excluded; for a tenancy by the curtesy depended absolutely on an estate-tail. And he therefore decreed the estate to be conveyed to the eldest son of the daughter and the heirs of his body, with remainder to the second son and the heirs of his body.

In the last noticed case *both* limitations, as well that to the daughter for *life* as that to the *heirs of her body* were mere *trusts*, the legal estate being devised to the trustees in trust, to *convey*, &c. which precluded all room for considering the limitation to the *heirs of the body* a use executed, as in the preceding cases; and consequently there did not exist that *difference* in the qualities of the two estates, to prevent their union, which governed the decisions in those cases. It is true the same rule of union generally operates in equity, where *both* the limitations are of the *equitable estate*, (as I shall have occasion to shew by and by,) except in cases where circumstances indicative of a contrary or incompatible intention are admitted to vary the construction; of which number Lord *Hardwicke* considered the case I have been mentioning.

Vide *infra*,
90, & seq.

From

From the two last cases it appears, that a trust for the *separate use of a feme covert* for her life, does not so specifically differ from a *general trust* for her for life, as to prevent its union with a subsequent trust for the heirs of her body; otherwise the court would have had no occasion for any resort to the freehold's being a mere *trust* and the inheritance an *use executed* in the first case, or the intended exclusion of the husband from all benefit after his wife's decease in the last case, as the ground of decision. And this conclusion seems well founded; for where *both* are *equitable estates*, how can they fall within the application of a doctrine founded *wholly* on the different natures of a *legal* and an *equitable* estate?

It may also be inferred, from what Lord Hardwicke said in the said case of *Roberts v. Dixwell*, of the husband being tenant by the curtesy if the wife had been intitled in tail, notwithstanding the court, by their authority, might have prevented the husband from meddling with the rents and profits during the life of the wife; that an equitable estate tail in the wife is not inconsistent with a trust for her separate use during her life; nor such separate trust of the freehold absorbed or merged in the general trust of the inheritance.

And

And accordingly, in a case where upon an appointment of lands to be purchased with trust money to the use of testator's daughter during her life, for her *sole and separate and peculiar use*, remainder to her children &c. ; it being held that, in order to effectuate the testator's general intention, it should be considered to vest an *estate tail in her* in the lands directed to be purchased ; the court directed that the money should be laid out in lands, and be settled to the use of trustees in trust for *her and the heirs of her body*, she to have the rents &c. to her *separate use*.

Pitt v. Jackson, 2 Brown Rep. Canc. 51.

In another case (more fully stated in an ensuing page) where upon a devise in trust to pay the rents and profits to a feme covert, for her *separate use* during her natural life, and after her decease to the use and behoof of the *heirs of her body* &c. it was observed in the argument, that the mother took no *legal estate*, her heirs must therefore take as *purchasers*, which was not denied nor any question made upon it. But in that case there were other words that more immediately directed the construction.

Vide Henry v. Purcell. infra, 108.

And where a testator devised lands to trustees upon trust, that they their heirs and assigns should yearly, by equal quarterly payments by and out of the rents and profits of
the

Shapland v. Smith, 1 Brown's Rep. Chanc. 75.

the premisses, after deducting *rates, taxes, repairs and expences* PAY *such* CLEAR SUM as should then remain, to his brother C. S. and his assigns, during his *natural life*, and after his decease to the *use and behoof* of the *heirs male* of the body of the said C. S. lawfully to be begotten, as they should be in priority of birth; and in default of such issue, remainder over; though Baron Eyre and Master Holford, thought that the estate for life was executed in C. S. yet Master Hett differed. And upon a rehearing Lord Chancellor Thurlow expressed his opinion, that the trustees being to *pay the taxes and repairs*, must have an interest in the premisses; and therefore that the *legal* estate for the life of C. S. was in them; and that C. S. had only an *equitable* estate for life, and the subsequent estate being executed could not unite; and of course that a recovery suffered by C. S. was void. But if it were only doubtful, he would not, he said, oblige the purchaser to take such title.

Silvester v.
Wilson,
2 Durnford
and East's
Rep. p. 444.

And in a case in the King's Bench, of a devise to trustees and their heirs upon trust, to stand seised of the lands during the term of the natural life of testator's son J. to such use and behoof as after mentioned, *viz.* that the trustees should yearly, and every year, during the natural life of the said J. *take and receive the rents, issues, and yearly profits of the premisses*;

premisses; and the testator ordered that such rents, issues and yearly profits, should be *applied for the subsistence and maintenance* of the said J. during his natural life; and immediately from and after his decease he devised the same premisses unto *the heirs of the body* of the said J. lawfully to be begotten, and for default of such issue then to his own right heirs. The court held that the *use* was not executed in the testator's son, but in the trustees *during his life*, from the nature of the trust to *receive and pay over* the profits, and the *application* directed for the subsistence and maintenance of the son, by which the testator seemed to invest the trustees with some degree of *discretionary* power in that respect. And there being nothing in the nature of the trust to prevent the limitation to the *heirs of his body* from being a *use executed*, they held the two limitations did not unite so as to give J. an estate tail.

It may be observed, that in the above noticed cases, which turned on the different qualities of the limitations of the *freehold* and of the *inheritance*, the ancestor's estate for life was an *equitable estate*, and the limitation to the heirs &c. carried the *legal* estate. I do not recollect any decided case where those qualities were transposed, *viz.* the *freehold* a *legal* estate, and that to the *heirs* &c. an *equitable*

table estate; as in the case of a devise to one for *life*, and after his decease to the *use of trustees*, in trust for the *heirs of his body*. In the decided cases, it seems to have been the *difference* between the *natures* of the two estates, abstracted intirely from the *order of their limitation*, that prevented their flowing into one. Where the limitations are both *legal*, the estate-tail arises by *legal* construction or a rule of *law*; and when the limitations are both *equitable* (without other ingredients in the case to controul the construction) a similar rule is adopted *by equity*, to preserve a uniformity in construction. But when both the estates are *not legal*, the application of a *legal construction* or operation of a *rule of law*, which must equally affect *both*, seems to be excluded, by one of the objects of that construction not being a subject of *legal* cognizance. So when both are *not equitable* estates, their combination seems to be out of the reach of an *equitable construction*, to which one of the estates is not adapted. A construction that should unite the two dissimilar estates, and blend them into one, seems to belong to a court having jurisdiction to give an *equitable* estate all the qualities or properties of a *legal one*, or of reducing a *legal estate* to the qualities and properties of a mere *equitable one*; or in other words, of annihilating their difference, and converting an *equitable* into a *legal*, or a *legal*

legal into an *equitable estate*—which seems to be the province neither of a court of law, nor of a court of equity. It would be difficult perhaps to describe the result of such an heterogeneous compound. Would it be a *legal estate tail*? surely not, the *legal inheritance* not being included in it. Would it be an *equitable estate tail*? That would be inconsistent with the ancestor's *legal estate*. If it be suggested, that the *legal estate* in the ancestor includes the *beneficial interest* in him, to which the equitable inheritance might attach, the question is how, or upon what principle of law or equity are we to *separate* this supposed *beneficial interest* from the *legal estate* in the ancestor, so as to consider him seised of an *equitable estate*? His estate for life is one *intire estate* for his own benefit not cloaked or connected with any *trust*, upon which to ground any distinction between the *legal* and *beneficial interest*. How are we to deem a man a *trustee* for himself, where *no trust at all* ever existed or affected the estate vested in him?

For (38 to 43 incl.)
vid. 31 to 34
supra.

It appears, that this rule of the subsequent limitation to the *heirs &c.* vesting in the ancestor when he takes a preceding freehold, prevails equally in limitations upon surrenders of copyholds. For where a man surrenders to the use of himself for life, remain-

Vide Gib.
Ten. 254.

(44)

Vide Case of
Allen v. Pal-
mer, 1 Leon.
101.

2 Roll. Abr.
794, p. 6.
Style, 244,
273. Paussey
v. Lowdall,
and vid.
Gilb. Ten.
254.

Bussy v.
Greenslate,
Strange, 445.

2 Atkyns,
101.
Sutton v.
Stone.

der to another in tail, remainder to the right heirs of the surrenderor; there his heirs shall have it by descent, *per Coke*. And where *A.* seised of a copyhold in fee, surrendered it to the use of his will, and afterwards devised it to *B.* for life, the remainder to his heir of his body begotten for ever; it was adjudged, that the heir of *B.* took by descent and not by purchase.

So where *A.* surrendered a copyhold estate to the use of his will, and then devised it to *B.* for life, and after his decease to the heirs of his body. *B.* died in testator's life-time after making the will, and it was held the heir of his body could take nothing, * for it was a devise in tail to *B.* and the words "heirs of his body" were words of limitation; and that its being copyhold, where the devisee was living at the time of the surrender, made no difference.

In a case noticed by *Atkyns*, upon a surrender of a copyhold to the use of the husband for life, then of the wife for life, and of the heirs of the bodies of the husband and wife,

* Vide similar point in freeholds in *Goodright v. Wright*, *infra*, fol. 124. *Hodgson v. Ambrose*, *infra*, 139. And vide *White v. White* in the House of Lords in 1782, and 1 *Brown. Rep. Chanc.* 219. in the note.

remainder in fee to the use of the survivor, it is said, the limitation did not vest an absolute estate-tail in the wife who survived, but only gave her an estate-tail *after possibility of issue extinct*, and that the estate-tail vested in the person who was *heir of the bodies* of both husband and wife. The reasons for this opinion are not mentioned; indeed it is not stated that it was the resolution of the court, nor does it appear whether that point entered the question then before the court; and I must confess, I think it is no easy matter to account for such an opinion.

The limitation to the heirs of the bodies of the *baron* and *feme*, must either have been executed in the *baron* and *feme* jointly as an estate-tail in *possession*, or have vested in them jointly as a *remainder*; unless it could have been held a *contingent* limitation to the *heir* of both their bodies. In neither of the two first cases could the wife be tenant in tail *after possibility of issue extinct*, so long as any *issue of her body by her deceased husband* was living; and if there was any such issue then living, it could not vest in such issue till her death. In the third case she could take no *estate-tail* at all, and consequently could not be tenant in tail *after possibility of issue extinct*. The only cases in which she could be tenant in tail *after possibility of issue extinct*, were those two, in

(45)

Vid. Inst.
27. b.

(46)

Vide supra,
p. 29.
Stephens v.
Bretridge.

which it was impossible there should *then* be any such person, as the *beir* of both their bodies. The question being upon a surrender of a copyhold, made no difference in the construction; as it was agreed in the same case, that surrenders of copyholds should be construed in the same manner as conveyances at common law. Now under a similar limitation at common law, I apprehend, the husband and wife taking distinct and successive estates for life, the joint limitation to the heirs of their bodies would not have been executed in them in possession, but would have been vested in them jointly, as a remainder in tail; that this remainder surviving to the wife upon the decease of her husband, would have merged her estate for life, so as to make her tenant in tail in possession; but she having had no issue by her deceased husband, or such issue being then extinct, would thereby have become only tenant in tail *after possibility of issue extinct*.

Roe v.
Aistrop,
2 Blackst.
Rep. 1228.

In a later case of a settlement by the husband previous to marriage, of his freehold estates, to the use of himself and his intended wife for their lives, and the life of the survivor; and after their decease to the *heirs of the body of the settler* on the body of his intended wife to be begotten, with remainder to his own right heirs; in which he covenanted

nanted to surrender his *copyhold* (which was of inheritance descendible by the custom of the manor to the *youngest son*) to the use of himself and his intended wife, and the *heirs of their two bodies* to be begotten, *in like manner* and to the *same uses*, as the freehold lands and tenements therein before mentioned, were settled and conveyed: and after the marriage surrendered the copyhold to the use of himself and wife for their lives, and the life of the survivor of them, and after their several deceases, to the use of the *heirs of their two bodies*; and for want of such issue to the use of himself in fee. *De Grey* Chief Justice, said it was a mighty clear case. That there was reason indeed to suppose, the parties might not mean the two estates to go in a different channel. But that was only supposition, and *if certain*, still as this was a *legal estate*, it was not in the power of the parties to alter the *legal course* of descent. That, it was an estate *executed*, and seemed to be an estate-tail in the father and mother; that, had it been *executory*, and upon articles, then, according to Lord *Hardwicke's* doctrine in *Supra*, 38. *Dixwell's* case, the court might have considered the word *heir* as a word of *purchase*; but that in the principal case it was impossible.—And *Blackstone* Justice, held the freehold clearly vested in the *father only*, in special tail, and the copyhold in *both father and*

mother; and that the words *in like manner* only meant that both estates should be intailed.

It is observable, that this was the case of an *actual legal settlement before marriage*, in respect to the freeholds; and therefore the limitation of those lands was not open to the construction of *articles* to be carried into strict settlement. And the settlement of the *copyhold*, though resting in the covenant for surrender, seemed intimately blended with that of the freehold, as part of one and the same settlement; besides that, the limitations of the surrender *agreed upon*, were expressly referred to the *same manner and uses* as the freeholds were settled; and therefore could not, consistently with the express terms of such a stipulation, be limited in strict settlement, on the *issue as purchasers*, when the settlement of the freeholds gave an *estate-tail* to the *parent*. And there was no other construction by which the descent of the lands to the youngest son, could be avoided. This takes it out of the authorities of the cases hereafter treated of, where marriage articles are carried into execution by way of strict settlement, and accounts for the distinction, by the Chief Justice, between this case as of an estate *executed*, and one *executory* on articles.

Infra, 63,
& seq.

And

And where an estate for life is limited either to the father or mother *only*, and the subsequent limitation is to the *heirs of both* their bodies, the construction is the same in regard to copyholds, as we have before found it to be in the case of freeholds; *viz.* the subsequent limitation does not vest in the *ancestor* taking the estate for life, but is a contingent remainder to the *heirs of the bodies* of both father and mother.

Vide p. 29 & 30, *supra*.

Thus where *A.* seised of copyhold lands in fee, surrendered them to the use of *D. and of the wife of A. for their lives*, and afterwards to the use of *the heirs of the bodies of A. and his wife*; upon a question in ejectment, whether this subsequent limitation to the heirs of the body of *A.* and his wife vested an estate-tail in the wife of *A.* it was held that it did not, but was a contingent remainder to the heirs of both their bodies.

Lane v. Pannel. 29 & 1 Roll. Rep. 238, 317, 438. (47)

So again in a much later case, where *J. S.* being seised in fee of copyhold lands according to the custom of the manor, surrendered the same to the use of *M.* his then intended wife, and the heirs of their two bodies lawfully to be begotten, and for default of such issue, to the use of the right heirs of the said *J. S.* The marriage took effect, and afterwards *M.* was admitted tenant to the lands according to

Frogmorton 29 & 1 on demise of Robinson v. Wharrey. 3 Will. 125, 144. 2 Black. Rep. 728.

the surrender. Upon a trial in ejectment, the question was, what estate the wife took under the surrender? It was contended for the plaintiff in the cause, that this was an estate in special-tail executed in *M.* the wife. On the defendant's side it was insisted, that *M.* only took an estate *for life*, with *contingent remainder* to the *heirs of the bodies of the husband and wife*. And upon a case stated for the opinion of the court of Common Pleas, that court, after hearing two arguments, and taking time to consider, determined in favour of the defendant.

- (48) But here, it may be observed, a distinction was taken by *Coke*, between a limitation upon a surrender by a copyholder in fee to his own heirs-general, where he takes a *preceding estate of freehold* himself, and the like limitation where he takes *no preceding freehold* estate; a distinction which certainly has no place in respect to *freehold* lands. In freeholds, we have seen, where the estate moves from the grantor, the ultimate limitation to his heirs-general, though the ancestor takes no preceding freehold, will be a reversion in him, and part of the old estate, and the heir will take it by descent; but in respect to copyholds, *Coke* held it to be otherwise. And where a copyholder surrendered his lands to the use of a stranger for life; remainder to the use of the

Vide p. 42,
supra.

the right heirs of the copyholder, who afterwards surrendered his (supposed) reversion to the use of a stranger in fee, and died, and the tenant for life died, and the right heir of the copyholder entered;—according to *Coke*—Nothing remained in the copyholder upon his first surrender; but the fee was reserved to his right heirs; for, said *Coke*, if he had not made any second surrender, his heirs would be in, not by *descent*, but by *purchase*. And, he said, the common difference was, that where the surrender was to the use of *himself for life*, and afterwards to another in tail, the remainder to the *right heirs* of the surrenderor, there the heirs should have it by *descent*; but otherwise, where the *surrenderor* had not *an estate for life or in tail* limited to him; for then his heir should enter as a *purchaser*, as if such use had been limited to the right heirs of a stranger.

Allen v. Palmer, 1 Leon. 101, c. 132.

Vide this distinction referred to 1 Durnford and East's Rep. 634.

(49)

Vide Gilb. Ten. 256, where this latter position is justly questioned.

The only ground upon which I can account for *Coke's* opinion, that the heir should take by *purchase* and not by *descent*, in the case where copyhold lands are limited back to the *heirs* of the *surrenderor*, he taking *no preceding estate of freehold*, is, the supposition that an *entire new estate* is created and derived under the *uses* of the surrender, throughout the *whole* of them; and that no estate taken under those uses is any part of

the old estate. And, indeed, if the uses of a surrender derived their effect entirely from *admittance*, (till which it seems agreed that the old estate remains in the surrenderor) that admittance being, if considered independently of the surrender, a *new copy or grant* from the lord, it would seem to follow, that the estates derived under and held, by such new copy or grant, would, strictly speaking, be new estates.

But the notion, on which the above noticed opinion of *Coke* seems to have proceeded, that the estates derived under the uses of a surrender, are *new estates* throughout, or any further than they *differ* from the estate in the surrenderor at the time, seems decidedly exploded by modern decisions.

Thus where a copyholder of inheritance, upon his marriage, surrendered his copyhold lands to the use of himself and his heirs till the marriage, then to the use of himself for life, remainder to the use of his wife for life, remainder to the use of their child or children according to their appointment, remainder to the heirs of his body by his intended wife, and in default of such issue, to the use of himself his heirs and assigns for ever. The marriage took effect; after which he surrendered the lands to the use of his will. He afterwards

Roe v. Griffiths, 4 Burr. 1952.

wards made a will, disposing of all his freehold and copyhold lands to his wife and her heirs. Some years after, he and his wife were *admitted* under the *first surrender, habendum* to him for life, remainder to her for life. After the husband's death, without issue, his widow was admitted *under his will*, and surrendered to the use of her own. And the question was, Whether her devisee was intitled; the heir at law of the husband contending, that the surrender to the use of his will operated only on his *old estate* in fee, and not upon the *new estate* he acquired by the *subsequent admittance* under the surrender on his marriage; and that the subsequent admittance was a *revocation of his will*. Lord Mansfield observing, that it had been argued on the *foot of a revocation*, and that the lord took from the surrenderor and re-granted him again the *whole estate*, and that this amounted to a revocation, said, that an *intention to revoke*, might indeed, if it had sufficiently appeared, have made a very different case. But it was clear that the testator had no such intention. The *change of estate* was therefore the only objection in the case. That where a man, seised of an estate, makes his will and devises it, and afterwards conveys it *entirely* away, though he takes it back by the same instrument, or by a declaration of use, it was a revocation; because he had departed
with

with his *whole estate*; but that the principal case did not come within the rule. The testator had a *reversion* in fee in him; and though he limited it to himself, the words did *not operate*; for the *use resulted* by operation of law. That reversion in fee, was the only subject matter of the devise. The *admission* must follow the *surrender*. It was no re-admission to his reversion; it effectuated the *uses limited*, but left the *reversion* as it was. That there was no conveyance of the fee, *no taking back* an estate in it. And all the Judges agreed, that, after the surrender to the uses of the settlement, the *reversion* still continued in the husband; and that no *alteration or change of estate* happened in the case.

And again, where *I.* being seised in fee as a copyholder, surrendered the lands to the use of *T.* and *E.* his wife, during their lives and the life of the longer liver of them, and afterwards to the use of the right heirs and assigns of the said *T.* for ever. At the same court *T.* and *E.* were admitted to hold to them and the heirs of the said *T.* according to the surrender; and *T.* thereupon, surrendered the lands to the use of his will; *E.* died, leaving her husband *T.* and issue by him, two sons *A.* and *B.*; afterwards *T.* upon an intended marriage with *S.* surrendered the same lands into the hands of the lord,

(50)

Thruitout on
demise of
Gower v.
Cunningham
Mich. Term,
1775.
Vide same
case, more
briefly re-
ported, 2
Blackit. Rep.
1046.

lord, to the intent that the lord should regrant the same to and for the several estates, uses, &c. following, viz. to the use of *T.* and his heirs till the marriage; and after the solemnization thereof, to the use of *T.* and *S.* his wife during their natural lives, and the life of the longer liver of them, and after the decease of the longer liver of them, to the heirs of their two bodies lawfully to be begotten, and for want of such issue, *to the right heirs of the said T. for ever.* The marriage between *T.* and *S.* soon after took effect, but no admittance was ever had under the last surrender during their joint lives.

After the marriage *T.* made his will, by which he devised the lands to *S.* his wife for life, and after her decease to *B.* his youngest son and *M.* his wife, for their lives and the life of the longest liver of them; afterwards *T.* died, leaving *S.* his widow without any issue by her; *S.* was afterwards admitted to the lands by virtue of the last surrender, to hold to her and her assigns according to the said surrender; and some time after *A.* the eldest son and heir at law of the said testator, was admitted to the reversion in fee expectant on the decease of the said *S.*; afterwards, upon the death of *S.*, *B.* the youngest son of the said testator being then dead, his widow *M.* was admitted for her life under

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the testator's will, and the first surrender to the use thereof; and brought ejectment for the lands against the defendant, who claimed under *A.* the testator's heir at law. Upon the trial at the assizes, a verdict was found for the plaintiff, subject to the opinion of the court of C. P.

(52)

It was insisted for the plaintiff, that the uses of the last surrender created new estates so far only as they differed from the estate which was in the surrenderor at the time of that surrender; that no alteration of the *old* estate was effected by that surrender, further than to supply the estates limited by the surrender to *T.* and his wife *S.* and the heirs of their two bodies; that the ultimate limitation to the *heirs* of the surrenderor was part of his *old* estate, which he had in him at the time of the first surrender to the use of his will; and as such, it continued subject to be disposed of by his will under that surrender: That *T.* dying without issue by *S.* the devise to his youngest son *B.* and his wife *M.* after the decease of *S.* the testator's widow, was a disposition out of that *reversion* in fee, which was part of his old estate that passed by the said surrender to the use of his will; and therefore *M.* the widow of *B.* was intitled under the said will, and surrender so made to the use of it.

On

On the other hand it was contended, that the estates derived under the new surrender upon the second marriage were new estates throughout; and among the rest, the limitation to the heirs of T. was a new estate in remainder in fee acquired to him, and was no part of the estate which he had before surrendered to the use of his will; and consequently could not be affected by that surrender; and therefore T. not having surrendered this new estate to the use of his will, was not enabled to devise it from his heir at law. That though T. was never admitted under the last surrender, yet the admittance of his widow after his decease under that surrender, being the admittance of those intitled in remainder under the same surrender (namely, the right heirs of the testator), the heir, by that admittance, came in of the *new* remainder in fee, limited to his father by the uses of the surrender, to which that admittance related. And although the old estate remained in the surrenderor, till the admittance under the new surrender; yet, that after the admittance of the widow, the old estate had no longer any existence at all; that admittance having completely passed the lands to the uses of the last surrender, under which A. the eldest son was intitled to the land as heir at law to his father.

(53)

But

But it was the unanimous opinion of the court, that the limitation to the right heirs of T. in the last surrender, was *part of his old estate*; and as such, that he was well enabled to devise it by the former surrender to the use of his will; and the court accordingly gave judgment for the plaintiff.

(54) It is obvious, that in the last case the will being *subsequent* to the surrender made upon the marriage, the question did not in any degree turn upon the doctrine of *revocations* of wills, which entered the case last before noticed. But the doubt was, upon the effect of the *preceding surrender* by T. to the use of his will, in regard to its enabling him to devise the *remainder in fee*, limited to him by the *subsequent surrender* made upon his marriage; and depended on the question, whether that limitation to his *right heirs* was a *new estate*, or part of his *old estate* unaffected by that surrender? Had it been a *new estate*, it seems it could not have passed by his will, for want of being surrendered to the use of his will; but as it was held to be part of the *old estate*, which was in him when he made the surrender to the use of his will, he was enabled to devise it by virtue of that surrender. As to there having been no admittance in his lifetime under the last surrender, that circumstance

stance seems to have made no alteration at all in the case; because the admittance of his widow, after his decease, was an admittance to all in remainder under the same surrender, according to the well known doctrine in such cases; and consequently, they could have come in by relation under that surrender, as if the admittance had immediately followed the surrender; and accordingly it was observed by J. *Blackstone*, that the case would have been all one, even, if upon the last surrender made by T. he had been admitted under it.

To resume our attention to the general rule I am treating of, we are to observe, that if there be a limitation to a man's heirs in any deed, or instrument, and afterwards he acquires the freehold, &c. by *other* conveyance or instrument; in this case, the two estates will not become *united* in him; but the limitation to his heirs will still continue what it originally was, a *contingent remainder*. Thus where A. was tenant for life, remainder to the *right heirs* of B., A. afterwards granted his estate to B. so that he became tenant *for life* of A. remainder to his *own right heirs*; the estate in remainder was not executed, for it was not conveyed by the *grant* of the *first grantor*, but by the act of *another person* after the grant.

(55)

29 Ed. 3.
cited 2 Leon.
7, and Ld.
Raym. 37,
in *Moor v.*
Parker.

And

Vide Skin.
559. 4 Mod.
319. Ld.
Raym. 37,
in *Moor v.*
Parker, infra,
228.

Snow v.
Cutler,
1 Lev. 135.

And so if there be tenant *for life*, and afterwards the reversion by some other conveyance be limited to his *heirs*, &c. it has been held, that such limitation will not be executed in him. So in a case where husband and wife being seised of a copyhold to *them* and the *heirs of the husband*; he, after a surrender to the use of his will, devised to the *heirs of the body of the wife*, if they should attain to the age of 14 years. The court agreed that the devise did not operate as a *remainder*; for though the wife had an estate for life, yet this was a *new devise* to take place after her death, and not a remainder joined to her estate.

(56)

2 Vern. 486.
Clifton v.
Jackson.
P. 30, supra.

P. 55, supra.

There was indeed, a case in Chancery, where Lord Keeper *Wright* seemed to doubt of this point; and said, the authorities were only in the affirmative, that if by the *same deed*, the estates *should* consolidate; not negatively, that if by *different deeds* they *should not*; and cited the case of *Pybus and Mitford*, where no express estate for life was limited, but arose by implication; and there it was held, that the estates were consolidated. However the court took time to consider. And, in truth, Lord Keeper *Wright*, when he said the authorities were only in the *affirmative*, &c. appears not to have been apprized of the case, 29 *Ed. 3.* cited by *Holt* in the case of *Moor and Parker*, (nor indeed of *Holt's*

OWN

own opinion in the case of *Moor and Parker*) which are direct authorities, that when the freehold in the ancestor, and the limitation to the heirs &c. are by *different* conveyances, they will not consolidate. And as to the case of *Pybus and Mitford*, though the freehold there was by implication, yet that implication arose upon, and was the *effect* of the *same deed* as contained the limitation to the heirs of the body; and consequently both estates might in that case be referred to the same deed. It seems, Lord Keeper *Wright* had not sufficiently weighed the grounds on which his doubt was conceived, and therefore took further time to consider of it. What was the result of his further consideration we are not (to my knowledge) informed.

(57)

Lord *Hardwicke*, it is true, expressed his idea, that a *resulting* trust of the freehold, might be considered as a continuing *precedent estate*, in connection with contingent remainders of the *trust*; but would not be understood to give any positive opinion on the point; only thought it deserved to be better considered, by reason of its analogy to the case of *Pybus v. Mitford*. But this respected an estate by *implication*, arising on the *same deed* that created the remainder; and therefore did not reach the question upon the connection of two estates, *created by, or acquired*

Vide 1 Atk.
596.

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under *different* instruments; which however seems now to be satisfactorily settled by a late case in the King's Bench.

Doe, lessee of
Fonnereau,
v. Fonne-
reau, Dougl.
Rep. 470.

The case was this. *C. F.* being seised in fee, settled the lands on his son *T. F.* for life, retaining the reversion in himself; and afterwards by his will, reciting that he had settled the estate on his son *T. F.* for the term of his natural life, he declared his will was, and he did thereby from and *after his* (the son's) *decease*, give and devise the same to the *heirs male of his body* begotten in lawful marriage, and in default of such issue to the use and behoof of the testator's own second, third, fourth, and fifth sons successively, in tail male. *T. F.* after the testator's death suffered a recovery, devised the estate, and died without issue.

One of the points contended for was, that the two estates, *viz. that settled on T. F. for his life*, by deed in his father's life-time, and *that devised to the heirs male of his body*, by his father's will, united and thereby created an estate-tail in *T. F.*: as, it was said, never to have been determined, that two estates in the same land, though by different conveyances, *both voluntary* and both flowing from the *same person* should *not* unite. Lord Mansfield, in delivering the opinion of the court; said,

said, they all thought, that the estate for life being by *one instrument*, and the limitation in tail by *another*, they could *not* unite, and that the *heirs male* of *T. F.* would have *taken by purchase*. That this was a SETTLED POINT, and they laid it down as their CLEAR OPINION.

It may not be improper, in this place, to notice a case which occasionally occurs to professional gentlemen in the course of practice. I mean that of an estate limited to one for life, by *deed*, and a limitation afterwards, in his life-time, to the *heirs of his body*, under an execution of a *power of appointment*, contained in *that deed*; as a limitation to the use of *A.* for life, and after his decease to such uses as *B.* shall appoint; who afterwards, in *A.*'s life, appoints the use to the right heirs of *A.* Upon which the question arises, Whether the limitations unite according to the general rule, or the latter operates by way of contingent remainder to the heir? Mr. *Butler*, in his valuable Annotations in the last edition of *Coke upon Littleton*, notices this case; and after stating the arguments in favour of the union of the two limitations, observes, that those arguments are open to some objections, particularly with respect to the position that both the limitations are *made at the same time*.—But I think an attentive con-

Vide Butl.
note 1. Co.
Lit. 299, b.

sideration of the principles on which the question turns, may serve to obviate the influence of those objections. I have known a concurrence of opinions of some of the first of the profession, at the time, in favour of the union of the limitations, under the circumstances in question. It is a conclusion afforded us, by a doctrine which, I apprehend, has long since transcended the limits of controversy, *viz.* that the limitation of a use, under an execution of a power of appointment contained in a conveyance to *uses*, in general, operates as a use created by, and arising under, *that conveyance itself*; and of course is the subject of the *same construction*, so far as the *time of its taking effect* admits, as it would have been if expressly specified and ascertained in the original deed itself. The only authorities against the union of the estate for life and limitation to the heirs, are cases where the two estates were *created* by or *acquired* under *different deeds* or instruments; but if we admit the appointment, made under a power contained in a settlement or conveyance, to be a *branch* of *that settlement*, merely *directing* the operation of it *quoad* the uses appointed, the limitations in such appointment, are of consequence *part of such settlement* or conveyance, and by relation *virtually contained* therein from the *time* of the *appointment*, only declared by way of reference to

to a subsequent specification thereof. So that the uses immediately contained in the original settlement or conveyance, and those immediately supplied by the appointment, equally owe their *creation and effect* to, and *arise from*, and are *acquired* under, such original settlement or conveyance. If so, the authorities against the incorporation of the two estates when *created* or acquired by *different deeds* or instruments, do not apply to such a case; which in truth falls within that class, where the two estates are *created* or *originate* in, and are *acquired* by the *same deed*. The rule expresses *no position*, in respect to *identity of time* in the *declaring*, but only of the *instrument creating* the two limitations; nor does coincidence in *time*, of the actual *specification* of the several uses, appear essential to the union of the two estates; since there is no necessity for their both *vesting* and taking effect at the *same time*. The common case of an estate to two or more for their lives, remainder to the *right heirs* of the survivor of them; and the case put 1 *Inst.* 378. *b.* that if lands be given to two during their joint lives, remainder to the *heirs* of him who shall die first, the heir of him who shall die first, shall have the land *by descent*, are direct authorities, that no identity in point of time of *vesting* of the two estates, is requisite to the operation of the rule in *Shelley's case*. And

Vide *supra*,
23.

if an estate limited under a power of appointment, in a deed, is by relation to be considered as *part of*, and to operate in the same manner, *from the time of the execution of the power*, as if contained in such deed; then have the original and supplemental limitations every quality of relation and connection, that they would have had, if both had been specified in the *original deed* itself, except in regard to their *time of vesting or taking effect*; which the cases last put, prove not to be essential to the operation of the rule. And the only instances that occur to me of an estate limited under a power of appointment in a deed, not operating from the *time of the execution of the power*, as if contained in such deed, are, in some cases where an appointment by *will* either fails by the death of the appointee in the testator's life-time; or is precluded by a *descent* to the appointee, as heir of the appointor; and in some limitations to persons not *in esse*, under a *general* power of appointment; that seem to be clear of those objections to a perpetuity, which would impeach their validity if limited in the *original deed*.

The general rule now treated of, respecting the union of a subsequent limitation to the heirs &c. with an estate of freehold given to the ancestor in the same conveyance, is laid down

Vide Duke of
Marlborough
v. Lord Go-
dolphin,
2 Vez. 61.
Southby v.
Stonehouse,
ibid. 610.
Hunt v.
Winchelsea.
1 Black.
Rep. 187.
2 Bur. 879.
Bath. not. 1.
Co. Lit. 379.
b. and infra.
393.

down in *Shelley's* case in the following terms, viz. "where the ancestor takes an estate of freehold either mediate or immediate, to *his heirs* or the *heirs of his body*; the word *heirs*, is a word of limitation of the estate and not of purchase."

The terms in which the rule is thus laid down by Lord Coke, have been the subject of animadversion in a valuable publication, to which I have had occasion to refer before; where the author says, it may be observed that the rule in *Shelley's* case is not perfectly accurate, in saying, that when there is, in the same conveyance, a limitation to the ancestor, for life, and mediately or immediately, to his heirs in fee, or in tail, the words "*his heirs*" are not words of purchase.—When there is an intermediate vested remainder in tail, these words, Mr. Douglas says, are words of purchase; they do not qualify the estate, or describe the quantity of interest given by the first limitation, but vest another estate, a remainder in fee or in tail in the tenant for life.

Dougl. Rep?
end of note 3,
in fol. 486.

This suggestion, that a rule of law of so much importance, and the subject of so much discussion, has been laid down in terms not perfectly accurate, by such a reporter as Lord Coke, of course excites the enquiry, by what

criterion such accuracy is to be determined? It must depend on our explanation of the expression, "*words of purchase*" as distinguished from that of *words of limitation*, in the cases to which the rule alludes.

If the expression "*words of purchase*" is explained to mean or comprehend words which give any other or further estate to the ancestor, than he would have taken without them, then, indeed, is the rule in *Skelley's* case, open to the imputed inaccuracy in terms. But if that be the true interpretation, or the extent of, the expression, "*words of purchase*," I fear it will be difficult to shew any distinction between *them* and *words of limitation*, or to produce an instance of *words of limitation* (to heirs, &c.) which are not at the same time *words of purchase*. For in a limitation to a man and his heirs, the words *his heirs* operate to vest in him *another and further estate*, than he would have taken without them, viz. the fee, which they superinduce upon the estate for life, given him by that part of the limitation which is expressly directed to himself. This is well exemplified by Mr. Justice *Blackstone* in his argument in *Perrin v. Blake*, ^{below} ~~above~~ cited, where he says, "that in the creation of an estate in fee, or " in tail, by a gift to *A.* and to his heirs " *for ever*, or to *A.* and to the *heirs of his body* " begotten,

Vide Harg.
Tracts, v. 1.
p. 500.

“ begotten, the first words (to *A.*) create an
 “ estate for life ; the latter (to his heirs or
 “ the heirs of his body) create a remainder in
 “ fee, or in tail, which the law, to prevent
 “ an abeyance, refers to and vests in the an-
 “ cestor himself, who is thus tenant for life,
 “ with an immediate remainder in fee or in
 “ tail, and then by the conjunction of the
 “ two estates, or the merger of the less in the
 “ greater he becomes tenant in fee, or tenant
 “ in tail in possession.”

Such consequently cannot be the meaning or import annexed by Lord Coke to the expression *words of purchase*, because he uses them in contradistinction to *words of limitation* ; which if we allow him a right to do, (and assuming it ourselves, we cannot well deny it to him) we must then recur to an explanation, which affords *some distinction* betwixt *words of limitation* and *words of purchase*, applicable to the terms of the rule as laid down by Lord Coke. And if under this constraint we admit the distinction hitherto apparently taken between them, and allow the former to mean or comprise words which do not give the estate imported by them *originally* to the heirs &c. described, or to whom they are *expressly directed*, but only extend the ancestor's estate, whether *immediately, mediately, or eventually*, to an estate of inheritance descensible
 to

to the *heirs described*, subject to the dispositions (if any) interposed between the two limitations; and confine the *latter*, viz. *words of purchase*, to mean such, as give the estate thereby imported, *originally*, to the heirs &c. described, and not through the *medium* of, or by *descent* from the *ancestor*; then will the terms of the rule in *Shelley's case*, stand *perfectly clear* of the *inaccuracy* suggested; at the same time, that the words *his heirs*, in the common limitation, to a man *and his heirs* for ever, will be words of *limitation* in the *correct sense* of that expression, instead of being *words of purchase*.

In truth the only substantial difference between a limitation to *A.* and his heirs, and a limitation to him for life, remainder to *B.* in tail, remainder to the *right heirs of A.* appears to be, that in the first instance, *A.* takes the *intire estate in fee*, and in the other he takes it, *divided by and subject to the estate-tail* in *B.* The words *his heirs*, in either case operate equally as words of *limitation*, viz. words giving the estate imported by them *not originally* to the *express objects of the description*, but extending the ancestor's estate *immediately* in the one case, and *mediately* in the other, to them *by descent*, and limiting the ultimate bounds of the estate which he is to take.

If

If in the case of a limitation to *A.* for life, remainder to another in tail, remainder to the *right heirs* or *heirs of the body of A.* we, on the ground of any supposed advance to accuracy, call the words *heirs &c.* words of *purchase*, because they give the *inheritance to the ancestor*, when he would have taken only an *estate for life* without them; then, upon the same principle, in a limitation to a man and to his *heirs for ever*, we must term the word "heirs" a word of *purchase*; as it gives him *another further estate, viz. the fee*, in addition to the freehold, which is all he would have taken without it. The attempted correction must fail or take place equally in both instances. The obvious impropriety of it in the latter, seems to involve the denial of its admission in the former.

When the words *heirs &c.* operate only to expand an estate in the ancestor, so as to let the *heirs* described into its extent and intitle them to take *derivatively*, through or from *him*, as the *root of succession*, or *person in whom* the estate is considered as *commencing*, they are properly words of *limitation*; but when they operate only to give the estate imported by them, to the *heirs* described, *originally* and as the *persons in whom* that estate is considered as *commencing*, and not *derivatively* from or through the *ancestor*, they are properly words of

of *purchase*. Lord Coke, in the rule under consideration, very properly refers the word *purchase* to the *express objects* of the limitation, viz. heirs &c. and when such *heirs* &c. originally acquire the estate by those words, he styles them words of purchase, otherwise not.

In general, words of *purchase* are those, by which taken absolutely without reference to, or connection with, any other words, the estate first attaches, or is considered as commencing in the person described by them; whilst words of *limitation* operate by reference to or connection with other words, and extend or modify the estate given by those other words. This is evidently the line of distinction adopted by Lord Coke, and which pervades the terms of the rule in question; and is, in fact, admitted by all who do not deny the word *heirs*, in the common limitation to a man and his heirs for ever, to be words of *limitation*.

But here it is to be remarked, that when the words *heirs male of the body* &c. operate as words of *purchase*; that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixed effect. For though they give the estate to the

the special heir *originally*, and not through or from his ancestor, yet the estate which he so takes, has such a reference to *the ancestor*, as to pursue the *same course* of succession, in the *same extent* of duration or continuance, through the *same persons*, as if it had attached in and descended from the ancestor.

Thus a limitation to the *heirs male* of the body of *B.* (where no estate is in or given to *B.* himself), though it originally attaches in his *heir male* under that special description, and so far operates as words of *purchase*, yet it not only gives *such heir* an estate in *tail male*, without any express words of limitation to the heirs male of *his own body*, but *such an estate tail*, as will, on failure of *his* issue male, go in succession to the other heirs male of the body of *B.*, in the same course as if the estate tail had *descended* from *B.* himself. And indeed this effect of words of limitation seems to be *included* in the import of the *descriptive words*: because heirs male of the body of *B.* equally comprehend, in point of description, *heirs male* of the body of *such heir male*, who after his death will be *heirs male of the body of B.* This virtually involves a limitation in *tail male* to such special heir; and as the same description equally comprehends *other male heirs* of the body of *B.*, who upon the decease, and failure of issue male of the

Vide Mandevile's case, Co. Lit. 26, b. supra, 30. Southcott v. Stowell, supra, 32. Wills v. Palmer, supra, 33.

the *first special heir*, will become heirs male of the body of *B.*, there is the same reason to consider *them and their issue male* as comprised in the limitation, as there was to entitle the *first special heir* and his *issue male* under it.

This devolution, after the decease and failure of issue male of the first special heir of *B.* to other heirs equally falling within the same description, has been stiled a *descent per formam doni*. But this sort of acquisition of, or succession to an estate tail, by the heirs male of the body of *B.* in a *collateral line between themselves*, is not strictly a *descent*; nor does it operate as a *purchase*. It is not strictly or completely a *descent*, because the estate never attached, or by possibility could attach *in the ancestor*, or be derived from or through him. It has not the effect of a *purchase*, because the estate goes in the *same course of succession* as it would have done, under a *descent*, exclusive of persons to whom it would have gone if the heirs male had taken *absolutely by purchase*.

If, for instance, the heir male of the body of *B.* were to take *absolutely by purchase*, then upon the decease and failure of issue male of a son of *B.* in whom the estate had *first vested* under that description, the estate tail *so vested* would *either* determine, and not go over to another son of *B.* who could not be *issue in tail of the person*

person in whom the estate tail so vested as purchaser, nor of course intitled to succeed to an estate tail originally acquired by his brother, independently of a description relative to their father or common ancestor; or else it would, on the principle of going in succession by way of purchase to persons absolutely answering the description of *heirs male* of the body of *B.* devolve on persons successively answering that description, and capable of taking under it originally by way of purchase, without any relation or respect to their capacity of taking such an estate tail by descent from *B.*; and of consequence would pass from the sons of *B.* on failure of their issue, on to the issue male of a deceased daughter of *B.* being then *heir male* of the body of *B.* capable of taking originally under that description by way of purchase. But if this devolution, or mode of succession to such an estate, possesses (as I apprehend) neither of these qualities, it certainly differs very materially from the acquisition of a new estate, originally and absolutely by purchase. So essentially indeed does it differ from a purchase, that the only mode of asserting the title under it, is by the supposition of a descent, in a writ of formedon brought for the recovery of the estate; which mode of recovery, at once extends and confines the succession to those, who would have taken, if the estate had descended from the ancestor

Vide 29 H.
6. 44. and
Co. Lit. 25,
b. Hob. 33.

Mandevile's
case, Co. Lit.
26, b, supra
30.

Vide 2 Mod.
209.

Wills v.
Palmer, su-
pra, p. 33.

Vide Harg.
n. 6. Co. Lit.
14, a.

ancestor named. And it has accordingly, in the language of our courts, at one time been stiled a *descent*, as distinguished from a *purchase*, whilst at another it has been stiled a *purchase*. As in the case of *Wills v. Palmer*, where the Judges said, that, in case a third person had been the grantor, they should have thought that *Henry Palmer* would have taken an estate in tail male by *purchase*. Now if the grant had been by a third person, the estate tail must, it should seem, have first vested in *William Palmer*, who at *Archdale's* decease was heir male of the body of *Archdale*, and *Henry* would have taken on the failure of his issue male, just as *Maud* did in *Mandevile's* case, on the death of her brother *Robert* without issue; which, though necessarily treated as a *descent* in her formedon, Lord *Coke* observes was not in truth a *descent* from *Robert*. Lord *Hale*, indeed, with an emphatical accuracy, calls it a *quasi intail*.

It seems, in truth, of a compound or intermediate description betwixt a *descent* and *purchase*. In point of *acquisition* it has the quality of the latter, as not being derived from or through the ancestor; but in regard to its *course of devolution*, it is referrible to the former, as pursuing the very same channel of transmissive succession. It is a sort of *intail*, which, though it first attaches in the special

special heir according to the nature of the description, yet terminates not in him and his representatives of the species denoted, but continues its progress through the whole race of heirs described; in the same course as if it had been an estate *vested* in the ancestor, *descendible* from him to his heirs of that description.

The rule has generally been considered of feudal origin, and introduced to prevent frauds upon the tenure. If such a limitation had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit, if occasion had called for it; if not, he might have let it remain to his heir in as beneficial a manner as if it had descended to him; at the same time that the lord would have been deprived of those fruits of the tenure, which would have accrued to him upon a descent. So that under such a construction, the ancestor would have had all the power over the estate which he would have had over a vested inheritance; and if he were not inclined to use that power, his heir would have taken the estate as fully as by descent, without the feudal burdens to which he would have been liable, in consequence of a descent. A construction so advantageous to the tenant, would doubtless have made limitations of that nature very frequent,

Vide 4 Bac.
Abr. 301,
and 2 Burr.
1106.

(58)

to the great prejudice of the lord of whom the lands were holden.

In those cases, indeed, where the limitation to the heirs &c. was not *immediate* upon the limitation of the freehold to the ancestor, or where the *ancestor himself* would not be intitled to the *inheritance* upon the destruction of the remainder to his heirs &c. there it could not be to the ancestor's interest, to destroy the remainder to his heirs, though it had been construed contingent; but nevertheless, the heirs would have escaped the same duties to the lord, and the lord of course have been the same loser in these as in the other cases. Therefore, though there was not the same ground to apprehend the great frequency of limitations of the latter sort, because of the limited interest the ancestor could have in them; yet, as they would have proved equally prejudicial to the lord whenever they should occur, as those other wherein the ancestor had a greater interest, the same reasons prevailed to extend the rule to all of them.

In a manuscript treatise, apparently of the Lord Chief Baron *Gilbert*, on the subject of Remainders, it is said, the reason of the cases falling under the rule, seems to be, *either* the prejudice that might ensue to the lord or to

the donor by the loss of wardship, marriage, &c. if such heirs should be purchasers; because they then claiming nothing from their ancestor by hereditary succession, would not be liable to the terms or conditions affixed to the *hereditary succession only*; and then every one would make their heirs purchasers; or from the prejudice that might happen to the heirs themselves, by the loss of such remainder, if the ancestor should do any thing to forfeit or determine his estate for life after the determination of the intermediate estate; for they, not being capable of taking such remainder when such preceding estates ended, could never after lay claim to it; and so an unwary ancestor might defeat his heir of the purchase; or, lastly, from the conformity or parity of reason they bear to a limitation to *A.* and his heirs, or heirs male or female of his body; for as the one gives an estate for life by implication, and more, so the other gives him the same in express words, and more; and *expressio eorum quæ tacite insunt nihil operatur*. And the interposition of another estate between them, only breaks the order of the limitation, not the operation of the words; which being the same in both cases, ought to have the same operation and construction*.

But

* I cannot omit this opportunity of acknowledging the obligation I am under to Mr. Hargrave, for his unsol-

Hargrave's
Collection of
Law Tracts,
vol. 1. p. 498
& 500.

But notwithstanding what has been said of the origin of this rule, the late Mr. Justice *Blackstone*, in his argument on the case of *Perrin v. Blake*, in the Exchequer Chamber, held it by no means clear, that the rule I am speaking of took its rise merely from feudal principles; he was rather inclined to believe that it was first established to prevent the inheritance from being in abeyance; and that one principal foundation of it, was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Another foundation, he said, might be, and was probably laid in a principle diametrically opposite to the genius of the feudal institutions; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser.

Ibid. 501.

The learned Judge refers to a case, which he believed to be the very first in our books wherein the principle was *established*. Where *A.* purchased the manor of *F.* to hold to himself and

licited communication of the treatise I have here cited; from which, the useful collection, under the title Remainder, in the third volume of *Bacon's Abridgment*, is probably an extract.

his wife and his eldest son, and the heirs of the body of the son, and if he died without heirs of his body, then to remain to the right heirs of *A.* the father. The son died without issue in the father's life-time. The father became bound in a statute merchant, and died, leaving another son his heir. To a writ sued out extending the lands of *A.* upon the statute, the sheriff returned he had delivered all the lands which *A.* had in fee, except the manor of *F.* in which he had *only* an estate for *term of life*. Upon this return it was argued, that *A.* took only an estate for life, the fee-simple being limited to *his heirs*, who therefore took by purchase; but the court held the contrary; for this reason among others, *because otherwise the fee and the right, after the death of the eldest son, would have been in nobody.*—And upon the whole he infers, that the rule was of the highest antiquity, not merely grounded on any narrow feudal principle, but applied in the very first instance we know of, to the liberal and conscientious purpose of facilitating the alienation of the land, by charging it with the debts of the ancestor.

M. 18 Ed. 2.
fol. 577.

Mr. *Hargrave*, in his profound and animated observations on the rule in *Shelley's* case, refers that rule with great ingenuity to a much broader basis, as one branch of a policy of law adopted to prevent annexing to a

Harg. Law
Tracts, v. 1.
p. 572.

real descent, the qualities and properties of a *purchase*. He treats it as one of the two barriers which our law places between descent and purchase. The rule of law which prohibits a man from raising a fee-simple to his *own* right heirs as purchasers, he considers as one of those barriers; observing, that as that rule applied only to the acts of the *ancestor*, as between himself and his *own* right heirs, it was requisite to have the same barrier between persons not standing towards each other in the *same* relation. And it was for that, the rule in *Shelley's* case was calculated; of which the short amount was, that no man should raise in *another* an estate of inheritance, and at the same time make the *heirs* of *that person* purchasers.

I am not apprised of any information that can be added to the authorities I have now cited, respecting the *principles* to which the rule in question is referrible. Upon which principles we may observe, that the ascribed policy of facilitating alienation of the lands, or subjecting them to debts, and of the law's prohibition of a man's raising a *fee-simple* to his *own* right heirs as *purchasers*, appears to reach only the limitation to the *heirs general*; for that to *heirs special* instead of a *fee-simple* raised an *estate-tail*, which was not *alienable*, nor *subject to debts*, at the supposed time of the establishment

establishment of the rule. But the aim of obviating the frauds on the tenure, and avoiding an abeyance of the inheritance, apply with equal force to both limitations.

Indeed to whatever origin or principles we refer the rule, I think the case cited by Mr. Justice *Blackstone*, 18 *Ed.* 1. will not admit our considering it as a settled rule, or one that *had obtained* a known establishment at that time, even in limitations to the heirs general. The sheriff's return, the debates in the court, and the reason given for the judgment, all concur in precluding such a supposition. I shall take another occasion to speak of the *extent* and *application* of this agitated rule.

Vide infra,
fol. 143.

But supposing the rule to have been of feudal institution, and consequently that the reason on which it took its rise ceased, with those fruits of tenure which it was calculated to preserve; has not the reason on which the right of primogeniture was established in this kingdom also long ceased? Did the original grounds of most of our English laws of property exist any longer than the feudal tenures prevailed? Yet does the right of primogeniture still continue part of the laws of descent in this country. And where is the authority to tell us, that the statute 12 *Car.* 2. c. 24. virtually annihilated the mass of our English

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laws of property, only by converting other tenures into common socage tenures?

(60)

We have many laws, the origin of which cannot at this distant period be traced at all; yet, justly should we laugh at the man, *urging that* as an argument against the present validity of such laws: and surely a law for which no reason at all now appears, has no more original ground in the present state of things, than a law, whose origin may be traced up to a circumstance which does not now exist. What reason then can be assigned, why the one should be less sacred than the other? Judge *Blackstone* in the argument above referred to, says, "were it strictly true that the origin of the rule in question was merely feudal, and calculated solely to give the lord his profits of tenure, of which (by the by) he had never met with a single trace in any feudal writer; still it would not shake the authority of the rule, or make us wish for an opportunity to evade it. There is hardly an ancient rule of real property but what had in it more or less of a feudal tincture; and after instancing several, he observes that whatever their parentage was, they are now adopted by the common law of *England*, incorporated into its body, and so interwoven into its policy, that no court of justice in this kingdom had

had either the *power* or (he trusted) the *inclination* to disturb them."

It is true where those things which are the objects of any rule of law cease to exist, there the rule itself must of necessity cease for want of subject-matter to relate to, or have any effect upon; but it by no means follows, that where the same objects of a law still continue, that there the law should cease, only because the very state of things which was the first occasion of it, no longer exists.

Whilst the same subject continues, there must be still the same necessity for some rule or regulation in respect to it. But if the old rule of law were to cease with the circumstance or state of things which gave it birth, the subject would remain at large, unregulated by any law, and exposed to the arbitrary direction of ignorance, partiality or caprice, until the legislature should interfere and make a new law respecting it. This would be opening a door perpetually to all that uncertainty, confusion, and inconvenience, which laws and rules were intended to obviate and prevent—The conclusion is, that every rule of law once *established* continues to be so, whilst the subject of it exists, until altered by some solemn act of legislation.

(61)

Now

Now in regard to the rule of law, or legal construction, whereby the limitation to the heirs &c. is executed in the ancestor, though we admit the reason upon which it first took place no longer to exist, yet the subject of the rule still remains; there are still the same limitations of estates for it to operate upon; and the law having been once so established; (no matter upon what ground) the courts of law, who considered themselves as entrusted with the power, not of abrogating or altering old, or enacting new, but only of expounding and pronouncing *established* laws and legal rules, have, through a long succession of determinations on this point, grounded their judgments upon that rule; as will appear, when I come to consider the several cases respecting it.

But if the recorded antiquity of the rule, if its adoption and prevalence during a period of near five hundred years (reckoning from the case 18 *Ed. 2.* cited by Judge *Blackstone*) have not yet stamped it with *legal sanctity*, nor entitled it to the attention and observance due to an *established rule* of law; vain, I am afraid, will be any resort to its origin or principles, at a period when they are confessedly either too *remote*, or too *latent*, for any more energetick influence, than what they

they can derive from the researches of learning, or the conceptions of hypothesis.

As to the distinction that has been attempted between conveyances by *deeds* and *devises*, so far as it has endeavoured to treat the latter as not within the reach of the rule, it is certainly groundless. And though the Master of the Rolls in the case of *Papillon v. Voice*, is reported to have said he did not know of any case where lands being devised to *A.* for life, remainder to the *heirs of his body* in case of a will had been construed an estate tail in *A.*—it is evident there must have been some misapprehension in the reporter, or inadvertency in the master, as Judge *Blackstone* observes in the above cited argument, and proves by referring to some antecedent cases. The adoption of the rule in wills, appears by several of the cases I have already cited, which together with others I shall have occasion to notice in the progress of these sheets, I think have fully established the application of the rule to limitations in wills, equally as in conveyances at common law; wherever the limitations in question give the *legal*, and not the mere *trust or equitable* estate.

Harg. Law
Tracts, vol.
1. p. 502.
Vide infra,
111.

The court of Chancery indeed has not considered itself tied up to an implicit observance
of

- (62) of the same rule, in respect to those limitations which are the immediate objects of that court's jurisdiction; I mean, limitations which do not include or carry the *legal* estate. In the decreeing the execution of marriage-articles and in the construction of trust-estates, of some descriptions at least, that court regards the end and consideration of the settlement, and the intent of the trusts, beyond the *legal operation* of the words in which the articles or the trusts are expressed.

Thus, in the case of articles *before* marriage for making a settlement, if there be a limitation to the parents for life, with a remainder to the heirs of their bodies, the latter words are, generally, considered as words of purchase, and not of limitation, and the future settlement or conveyance in pursuance of such articles, will be decreed to be made agreeable to such construction.

1 Eq. Abr.
387. Trevor
v. Trevor.

As where *A.* in consideration of an intended marriage, entered into articles, by which he covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the *heirs-males* of his body upon the body of his intended wife to be begotten, and the heirs-males of such heirs-males issuing, remainder

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to the right heirs of the said *A.* for ever ; and covenanted, that in case the said limitations were not thereafter well raised according to the intent of the said articles, that he and his heirs would stand seised of the premisses, until a further assurance thereof should be made to such uses, intents and purposes, as in the articles were before expressed and declared. The marriage took effect, and *A.* had issue four sons and two daughters. The articles were laid by *unnoticed* for several years ; and *A.* levied a fine of the lands (supposing himself to be tenant in tail under the articles) ; and afterwards, both the trustees being dead, without requesting a settlement, *A.*'s eldest son having married against his father's consent, and by several other acts of weakness and disobedience much offended him, *A.* by deed reciting the said articles, and the weakness and disobedience of his eldest son, declared, that the said fine so levied by him, should enure to the use of himself for life without impeachment of waste, remainder to his wife for life, remainder to his second son in tail-male, with like remainders to his two younger sons, with remainder to his own right heirs ; and after making a like settlement of other lands, *A.* died intestate, leaving a great personal estate, and leaving a real estate in *Ireland*, and new-purchased lands in *England*, together of the value of 1000*l.* *per annum* and

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and upwards. Upon his death, the estate in *Ireland* and the new-purchased lands descended to his eldest son, who also became intitled to his share (upwards of 9000 *l.*) of the personal estate. The second son entered upon the settled estates, and the eldest son having got possession of the articles, which it appeared had been thrown by several years as useless, brought his bill for a specific performance thereof.

It was insisted for the defendant, that though by the first part of the articles they seemed to be *executory*, yet by the covenant to stand seised in the last part of them, they were actually and immediately *executed*; that he thereby covenanted to stand seised to the before-mentioned uses, till a settlement was made accordingly; that no settlement having been made, the uses continued to be executed by virtue of that covenant; that by these uses he was plainly tenant in tail, and by the fine had bound his issue, and made himself master of the estate, and might dispose of it as he thought fit. But Lord Chancellor said, that upon articles the case was stronger than on a will: that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled when they come to be carried into execution, as to make them effectual. That the intention

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tion was to give *A.* only an estate for life ; that if it had been otherwise, the settlement would have been vain and ineffectual, and it would have been in *A.*'s power, as soon as the articles were made, to have destroyed them ; that the covenant to stand seised was, until such time as the said uses were well raised, according to the true intent and meaning of the articles. That if a settlement had been made defective in any particular, it would not have been final or conclusive ; that a second settlement must have been made *till the uses were well and truly raised* ; and that this covenant for ever subsisted till such settlement should be made ; that he hoped never to see the time when the court would so far have power as to judge what behaviour of a son should amount to a forfeiture of his estate ; and therefore thought, if a settlement had been made, no misbehaviour of the son could amount to a forfeiture of it. That this estate being specifically agreed to be settled, it was a trust for the eldest son, which passed with the lands into whose hands soever they came, and could not be defeated by any act of the father or the trustees. And therefore he decreed a conveyance to the plaintiff, and the heirs-male of his body, and an account of the profits from his father's death, and the deeds and writings to be delivered up. This decree

2 Brown ,
Cafes Parl.
122.

decree was afterwards affirmed in the House of Lords.

Streatfield v.
Streatfield,
Caf. Temp.
Talbot, 176.

So where the husband, before marriage, agreed by articles to settle lands to the use of himself and his intended wife for their lives, and the life of the survivor, and afterwards to the use of the heirs of his body on the wife, and after the marriage, by settlement reciting the articles conveyed the lands to the use of himself and his wife for their lives, and the life of the survivor, remainder to the use of the heirs of his body by his wife; it was held not to be a *proper execution* of the articles, though the articles did not expressly mention the intent to provide for the issue. For Lord Talbot observed, it could not be doubted but that, upon an application to the court for carrying the articles into execution, it would have decreed it to be done in the strictest manner, and would never have left it in the husband's power to defeat and annul every thing he had been doing; and the *nature of the provision* was strong enough for that purpose, without any express words.

It is the same in the case of articles for settling the *wife's estate*. The limitation to her for life, and a subsequent one to the *heirs of her body by the husband*, have been decreed

decreed to operate by way of strict settlement.

Accordingly, where articles were entered into, for investing the wife's portion in the purchase of lands, which should be settled on the husband and wife for their lives, and the life of the survivor, and after to the *heirs of the body of the wife* by the husband to be begotten; the settlement was decreed to be made to the *first and other sons successively in tail*, so that the husband and wife might not have power to bar the issue.

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1 Eq. Abr.
392. Jones v.
Laughton.

And where the agreement was for limiting the estate to the parents for life, remainder to the *heirs of both their bodies*, the latter limitation has been executed in strict settlement.

Thus in a case where articles were entered into by the husband, in which he covenanted that as well all the real estate that he had then in *Ireland*, as all the lands and tenements which he should purchase during the life of his intended wife, should *descend and come to the heirs male* to be begotten *on the body of the intended wife by the husband*, and should be secured and settled on the said *heirs male* by the husband, as the counsel of the

Cusack v.
Cusack,
1 Brown
Cas. Parl.
470.

intended wife should advise. Upon an appeal to the House of Lords, from a decree of the court of Chancery in *Ireland*, the decree was reversed; and it was ordered that a son of the marriage should be deemed a *tenant in tail*, under the articles, and to hold and enjoy the lands against all persons claiming under a subsequent settlement by his father; who had *levied fines and suffered recoveries* to bar the *supposed intail*.

Nandick v.
Wilkes, 1
Eq. Abr.
393. c. 5.
Gilb. Eq.
Rep. 114.

And in a case where the *husband* entered into a bond to surrender copyholds to the use of himself for life, remainder to his wife for life, remainder to the heirs of *their two bodies*, then to the husband in fee; upon a bill against the husband, after the marriage, for execution of this engagement; the decree was, for him to surrender to the use of himself for life, remainder to the use of his wife for life, remainder to the use of the first and other sons in tail general successively, with remainder to the daughters in tail general.

Vide Burton
v. Hastings,
infra, 72, 72
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So where the intended wife's estate was articulated to be settled on the husband and wife, and on the *heirs of their two bodies*, Lord Cowper admitted, that if no settlement had been made, the court would have taken care

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to secure to the daughters the provision intended them by the articles.

In the above noticed cases, the limitation in the articles importing an estate tail either in that parent from whom the estate moved, or in both the parents, would have put it in the power either of the *father alone during the coverture*, or of the *settling parent alone after the death of the other*, to bar the issue; and that power would not have been restrained to the *concurrence of both* parents.

But I have not met with any case, in which the same doctrine has been extended to a limitation, giving an estate tail to the *wife alone*, in the estate *moving from the husband*. There rather seems to have been a distinction taken between that and the other cases, in respect of its not leaving it in the power of *either of the parents alone* to bar the issue, *either during or after the coverture*; for in such case, as the husband takes no estate tail, it is evident he cannot, during the coverture or afterwards, bar the issue of the marriage; and the wife of course cannot, during the coverture, do it without his concurrence; and her estate tail being *ex provisione viri*, the statute Hen. 7. prevents her doing it *afterwards*. And it has been held, that their power of

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doing it *jointly* is not unreasonable, or inconsistent with the probable view and intent of the settlement.

Honor v.
Honor, 1 P.
W. 123. 66

Thus in a case more fully cited below, where lands were agreed to be settled to the use of the husband for life, remainder to the wife for life, remainder to the *heirs of the body of the wife* by the husband; Lord Cowper said the articles were prudent articles, and the wife, though she was to have an estate tail thereby, yet could not bar it, but was restrained by stat. 11 H. 7.

Whately v.
Kemp, cited
2 Vez. 358.

So where by articles previous to marriage it was agreed to purchase lands, and settle them to the use of the husband for life, then of the wife for life, remainder to the use of the *heirs of her body by him*; they purchased and joined in a recovery to the use of a mortgagee in fee. Upon a bill by the eldest son after the death of his mother, insisting that he was intitled, on the construction of these articles in equity, to have the estate settled to the first &c. son in tail male. Sir Joseph Jekyll said, that if this had been a *common limitation*, he should have thought what was insisted on was right, and that the mortgagee must have lost his estate. But that this was particular to *the heirs of the body of the wife*

wife by the husband, and being *ex provisione viri*, would secure the children against the father alone; and that it might be the real intent that *both might bar*, comparing it to a power of revocation *both by father and mother*; and the defendant was therefore well barred.

So in a subsequent case, Lord *Hardwicke* said he might compare it to the case where, by a settlement of lands, the wife has an estate *ex provisione viri*, the court has refused to interpose to settle the estate *otherwise*, because the intent will prevail, since she cannot alien by stat 11 H. 7.

In *Green v. Ekin*, 2 Atk. 473.

And in a very late case, where by marriage articles, customary lands of inheritance of the intended husband, holden by copy of court roll, were agreed to be settled to the use of the intended husband for life, remainder to his intended wife for life, and after the deceases of both to the use of the heirs of *her* body by him if *he* survived her, but if *she* survived him to the heirs of *his* body on her body to be begotten, remainder to his own right heirs. The marriage was had, and the husband afterwards surrendered the lands to the uses mentioned in the articles, and was admitted accordingly. And at the same court he and his wife surrendered to certain uses. And on

Highway et al. v. Banner et al.
1 Brown Chan. Caf. 584.

a question between a son of the marriage claiming under the intail in the articles, and others claiming under the said surrender by the husband and wife; one of the points made, and that on which the decision proceeded, was, Whether the surrender to the uses in the articles was a due execution of the uses of the articles; and whether, by the subsequent surrender, the husband gained an absolute power over the wife? We are to observe, that estates tail were barrable by surrender, according to the custom.

The Master of the Rolls said, that the rule had been settled and adhered to in many cases, that articles for a settlement on a husband, and the *heirs of his body*, should be carried into execution in strict settlement; and it had been considered as vain to make a settlement which instantly might be defeated by a recovery; but the doctrine had never gone so far, where that party could not suffer a recovery *alone*. He observed, that it was antiently a common mode of settlement to the husband for life, to the wife for life, and to the heirs of the body of the wife by the husband; it was thought a sufficient precaution to preserve the intail, that it could not be destroyed unless *both* husband and wife concurred. That in the principal case, the limitations

tations appeared to be anxiously worded ; the concurrence of *both parties* was necessary to destroy the intail ; it was out of the power of the *survivor*. He was not to look to the impropriety of what had been done, but to the power the parties had to do it, and he thought that point clear.

And when there has been a difference between *two sets* of limitations on the face of the articles, that evidenced a distinction in the intention of the parties themselves, between a *strict settlement on the issue* of the marriage, and an *intail in the parent*, by expressly securing a provision for such issue, under a limitation of one fund or estate in *the way of strict settlement* ; and at the same time limiting *another estate* in a more general way to the *heirs of the body of the father* ; the court has thought there was not sufficient ground for executing the latter limitation in strict settlement.

And therefore, in a case where money, in the hands of trustees, was articulated to be laid out in the purchase of lands to be settled on the husband for life, remainder to the intended wife for life for her jointure, remainder to the first and other son and sons of the marriage in tail male successively, chargeable

Chambers v.
Chambers,
Fitz. Gibb.
Rep. 127.
2 Eq. Ab.
35. c. 4.

with 2000*l.* for younger children, remainder to the husband in fee ; and the husband's father by the same articles covenanted to settle other lands on the husband, and the *heirs male of his body*, remainder to the heirs of the father. Upon a question, whether a subsequent settlement of the last-mentioned lands by the husband's father, on the husband and *the heirs male of his body*, with remainder to the father in fee, was a good performance of the agreement ; or whether the limitation ought not to have been on the husband *for life*, with remainder to his first and other *sons in tail male* successively in *strict settlement* ? Lord Chancellor King held that the settlement was a *good execution* of the agreement, and therefore confirmed the settlement. He said, that by the articles those lands were not intended to be settled as a *provision for the children* of that marriage, *they were taken care of* by the *other part* of the articles by the trust money ; and it was not like the common case of articles for a settlement on the issue of the marriage where *no other provision or care is taken* for them ; and the *different manner* of penning the articles in relation to the *trust money*, and as to *those lands*, the one to be in *strict settlement* to the first &c. son of that marriage, the other limited to the husband and the *heirs male of his body* generally, and
not

not tied up to *the issue of that marriage*; shewed plainly the parties *understood*, and had in contemplation the *difference* between a strict *settlement upon the issue of that marriage*, and a *general settlement* upon the husband and the *heirs male* of his body.

And accordingly, in a case of marriage articles, where *part* of the estate was limited to the husband for life, remainder to the wife for life, and after the death of the survivor remainder to the *heirs of the body of the wife by the husband*, another part to the husband for life, remainder to the *heirs of his body*, remainder to the wife. Upon a bill filed by the eldest son to have the articles carried into execution strictly to the first &c. son in tail, Lord *Hardwicke* observed, there was a difference in the penning of the two limitations; on the first they might have it in view to leave it in the power *not* of the *father only*, but of *both* to vary; but on the second there could be no sense of the limitation, but as the son contended for; otherwise it would be absolutely in the power of the father, by fine, to bar it, and defeat all the issue. They intended the wife should have a jointure in the one, in the other not. It seemed a strong distinction on the face of the articles, and there had been cases adjudged on that.—

That

Howell v.
Howell, 2
Vez. 358.

—That where by articles part of an estate was limited to father for life, to wife for life, to first and every other sons and daughters in tail, another part to testator for life, and the heirs male of his *body by that wife*, Lord Macclesfield said, if that had been the *sole limitation*, he should without scruple decree in *strict settlement* according to the common rule; but where the parties had shewn they *knew the distinction* when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation; decreeing to the father *in tail* as to the last, though not as to the first *. —That as in the principal case there was a difference in the penning the articles, in one of which they might intend to leave it in the power of the father, in the other not in his power to do it alone, it was a reasonable way.

The above cited cases are instances wherein there were *articles only*, and no *settlement previous* to the marriage; and the court was applied to, to carry the articles into execution, or rectify the settlement made after the marriage in consequence of the articles. But there are also instances where there were both articles and a settlement expressly *in pursu-*

* The report in *Vezey* does not ascertain the case thus cited by Lord Hardwicke.

ance thereof, made *previous* to marriage; and the court, upon an application for that purpose, has interfered to rectify such settlement, in conformity to the nature or constructive import of the limitations in the articles.

Thus where articles were made previous to, and in consideration of a marriage, for settling lands to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body *of the wife* by the husband begotten, remainder to the husband in fee; and before the marriage a settlement was made reciting the *articles*, and expressed to be in *purfuance thereof*, limiting the lands to the use of the husband for life, remainder to the wife for life, remainder to the *heirs of the body of the husband* by the wife, remainder to him in fee. There was issue of the marriage one son; the father married again, had several other children, and having procured his son, without any consideration, to join with him in mortgaging the estate, and limiting the fee simple and equity of redemption to the father. Upon a bill afterwards brought by the son to compel his father to resetttle the land on the son, after his (the father's) death, pursuant to the articles.

Honor. v.
Honor, 2
Vern. 658.
1 P. W. 123.

Lord Chancellor held it was a plain mistake in making the settlement vary from the articles,

ticles, which were prudent articles; and the settlement, said to be made *pursuant thereto*, shewed there was *no alteration* of the intention, nor any new agreement between the making of the articles and the settlement; and this appearing on the face of the articles and settlement, the length of time (about 25 years) was immaterial. And he decreed the father and his second wife to join in a conveyance to settle the estate as by the articles, *viz.* to the father for life, remainder to the son in tail; but as to the mortgage, the son having joined in it, the court would not set it aside, but directed the father to keep down the interest during his life.

It is true, there was a case in Chancery before Lord Cowper, where marriage-articles were entered into for settling the wife's estate *on the husband and wife, and on the heirs of their two bodies to be begotten*. After the marriage, a settlement was made of the lands upon the husband and wife for their lives, remainder to the heirs of the body of the wife by her said husband. There was issue of the marriage one daughter only. After the death of the husband, his widow married again, joined in a fine of the lands, and settled them to other uses. A bill was brought by the daughter of the first marriage, to carry the articles into execution; for that no care was taken

Burton v.
Hastings,
Gilb. Eq.
Rep. 113.
Abr. Eq. 393.

taken of the daughters by the settlement, as the limitation to the heirs of the body of the wife by her first husband made her tenant in tail; and consequently left her the power to bar them, which was contrary to the intent of the articles, that being to make an effectual provision for all the issue of that marriage: But Lord *Cowper* dismissed the bill; saying, if no settlement had been made, and application had been made to the court for making one pursuant to the articles, the court would have taken care to have secured to the daughters the provision intended them by the articles. But a settlement having been actually made and accepted by the parties, he could make no alteration in it.

And in a subsequent case, where articles were entered into for settling lands to the use of *B.* the intended husband for life, without waste, remainder to *M.* the intended wife for life, remainder to *the heirs male of the body of B. by M.* remainder to the heirs male of the body of *B.* by any other wife, remainder to *the heirs female of the body of B.* by the said *M.* with leasing and jointuring powers to *B.* Afterwards, and before the marriage, a settlement was made, and mentioned to be *in pursuance and performance* of the articles; and the lands were thereby limited to *B.* for life, remainder to *M.* for life, remainder to the first
&c.

2 P. W. 349.
West v. Errisley.

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3 Brown
Caf. Parl.
327.

&c. son of the marriage successively in tail male, remainder to the first &c. son of *B.* by any other wife in tail-male successively, remainder *to the heirs of the body of the said B. by the said M.* remainder over. They had issue only one daughter, who died, leaving two daughters. *B.* having an estate-tail under the limitation to the *heirs of the body* &c. suffered a recovery, sold part of the lands, devised the residue, and died. The grand-daughters brought their bill in the Exchequer against the executors of *B.* to rectify the mistake in the settlement, in limiting an estate-tail to *B.* instead of limiting it in strict settlement, as by the articles it ought to have been. The articles were made in *December*, the settlement in *March* 1685; the sale of the lands in 1698, and the will in 1722; the defendant pleaded the settlement, the recovery, the will, and the long enjoyment; but the plea was over-ruled by Lord Ch. B. *Gilbert* and the other Barons; and after hearing the cause, Lord Ch. B. *Pengelly* and the other Barons dismissed the bill without costs; it appearing to them dangerous to set aside a settlement, which seemed to have been solemnly and deliberately made. But on an appeal to the Lords, this dismissal was reversed, and the lands *not sold* were decreed to be conveyed to *the grand-daughters and the heirs-female* of their bodies, as tenants in common, with

with cross remainders to them in tail-female; and the devisee to account for the profits, and the executor to account for the purchase-money received by *B.* for the lands by him sold, and to pay interest for the same; the writings to be brought into the court of Exchequer, and possession to be delivered to the appellants; and the principal monies arising by the said sale to be laid out in lands, to be settled to the same uses as the lands unsold were decreed to be conveyed to.

The principal grounds of this appeal were, That the express estate for life, without waste, with power of leasing given to *B.* in the articles, was plain evidence that a strict settlement was intended, and that he should have no power to bar his sons or daughters— That the settlement took notice of the articles, and was expressly said to be made *in pursuance and performance thereof*; which demonstrated that the parties did not design to depart from the articles, nor had come to any new agreement for that purpose—That there seemed to be as much reason, that the expression of *heirs-female* of the body, contradistinguished from sons, should, in marriage-articles, have the same construction in favour of daughters, as the expression of *heirs male* had in favour of sons; both being equally under the contemplation of the parties; and especially,

Vide Honor
v. Honor,
1 P. W. 123.
supra, 66.
and 2 Vern.
658.

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especially, since in this case *there was no other provision* for daughters besides the limitation intended them by the articles; and according to the common course, where a provision is made for daughters by a term of years, it is always so limited as to be out of the father's power to bar it.

Powell v.
Price, 2 P.
W. 535.

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In another case, indeed, where marriage-articles were entered into for settling lands to the use of the husband *D.* for life without waste, remainder to trustees and their heirs during his life, to support contingent remainders, remainder in part to the wife *E.* for her jointure, remainder as to the whole to first &c. son of the marriage in tail-male successively, remainder to the *heirs-male of the body of the husband* (*i. e.* by any wife,) remainder to the *heirs of his body by his said wife E.* remainder to his own right heirs, with a clause empowering husband and wife to make leases; and also a clause that if he should die without issue-male by his said wife, if there should be one daughter, she should have 3000 *l.* and if there were more daughters than one, they should have 4000 *l.* among them; which portions were to be secured on some part of the estate. It happened there was issue of the marriage only one daughter. *D.* survived his wife, and suffered a common recovery of the lands, and made another settlement

element of them in consideration of, and previous to, his second marriage; subject as to part to a trust for raising 3000*l.* for his daughter by his first wife, in satisfaction of the portion she was intitled to under the first articles, and maintenance for her in the mean time.

The question was, (here being notice of the first articles) whether the limitation in the first articles *to the heirs of the body of D. by E. his wife*, should not be taken as if it had been to the daughters of *D.* by his said first wife? For then they could not be barred by the recovery (considering the preceding intermediate limitation to the heirs male of his body at the same time as words of purchase.)

It was insisted, that here the limitation to the heirs of the body of *D.* by *E.* his first wife, must be the same as if it had been to the daughters; for it could not be intended in favour of the sons of that marriage, there being an express limitation before to them; and though in the case of a settlement, there being a precedent estate for life to *D.* it would have been an estate-tail in him barable by the common recovery, yet it was otherwise where it rested upon articles; and the case of *West v. Errissey* was cited.

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Supra, p. 66.

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On the other side it was said, and resolved, that the 3000*l.* secured by the settlement on the second marriage, was an actual satisfaction of all demands under the articles; and that though a limitation by articles to the *heirs-male* of the marriage, after an express estate for life to the father, should be taken to mean a remainder to the first &c. son, it does not follow that a limitation to the *heirs of the body* must be equivalent to a remainder limited to daughters; especially in this case, where they were postponed to the limitation to the *heirs-male* of the body of *D.* by any wife; and where there was an *express pecuniary provision* made for the daughters by the first wife; which was all they were to depend upon.

(72) And the following diversities were taken by the court, between this last case and the case of *West* and *Errissey*; in the case of *West* and *Errissey*, no portions were provided for the daughters of the first marriage; in the last case, portions in all events were secured to such daughters. In the case of *West v. Errissey*, after the limitation in the articles to the *heirs male* of the body of the husband and wife, and the remainder to the *heirs-male* of the body of the husband by any wife, came the remainder to the *heirs-female* of the body of the husband

band by the first wife &c. so that the daughters, were more immediately in the view and contemplation of the parties, than in the last case.

The distinction between the two cases of *West v. Errissey*, merits particular attention; in order to prevent our mistaking them for clashing authorities; and enable us to discriminate properly, between their respective applications to the circumstances of cases, that may occasionally arise for our consideration in the course of practice.

The prominent features of distinction, were the expressions *heirs-female* as contradistinguished from *heirs-male* in *West v. Errissey*; and the want of any other provision in that case for daughters, than the limitation intended them by the articles, under the description of *heirs-female*; whilst in *Powell and Price*, the words *heirs of the body*, were not so direct a designation of *daughters*, as to denote them the immediate objects of contemplation; and there were portions secured to the daughters of the marriage, independently of the construction or effect of the words *heirs of the body*.—A little consideration will shew these distinctions in a much stronger light, than the first glance may represent them.

The description of *heirs-female*, cannot be explained into any other intention in regard to its objects, than *daughters*, after the contradistinguished limitation to *heirs male*, applied to *sons* and their issue male. But *heirs of the body* &c. extend in *expression*, and may also embrace in *intention* other objects; namely, *heirs-female* of the *sons*, so as to let in the daughters of sons, who are not comprehended in the limitation to *heirs male*. An immediate view or contemplation of *daughters* of the marriage, after sons, would, it may be supposed, suggest the *expression heirs-female*, after a designation of the sons by the words *heirs male*; but *heirs of the body* is the only concise *expression* that could be calculated to comprehend and let in the *heirs-female* of sons. And might not, under that *expression*, a daughter of a son, have as fair a claim to have the articles executed, so as to give estates in tail general to the sons, in order to let her in, as the issue of a portioned daughter can? Where, indeed, the daughters of the marriage are not otherwise provided for by portions, their equity under the general consideration of marriage stipulations, *viz.* the provision for the immediate *issue* seems well founded, and superior to the claim of a daughter of a son. But where the daughters of the marriage have an absolute provision

vision under the articles, why is the court to abridge the general extent of the words *heirs of the body* in their favour, in preference to the daughter of a son, equally included in the import of those words, and not otherwise provided for at all? If the words *heirs of the body*, after a limitation to sons in tail male, subject to portions for daughters in failure of issue male, are to operate in the way of *strict settlement*, in giving estates by purchase to the issue expressed by them, why are they to be confined to daughters and their issue only, in exclusion of the issue-female of sons? Can the intention be supposed of preferring the daughter of a daughter provided for, to the daughter of a son? If not, where is the ground for narrowing the words *heirs of the body*, in construction to *heirs-female*, in exclusion of the latter? And if these words are to be understood in their own extent of *heirs of the body*, they cannot have effect by way of *strict settlement*, without limiting estates to the first and other sons in *tail general*, previous to the limitations to the daughters. But where is the authority for the modelling of articles to such an extent, after giving the same sons estates in tail male, under the limitation to *heirs male*, subject to portions for daughters? Or how does the general principle, on which a court of equity seems to interpose on these occasions, require it? The marriage,

and articles for settlement, suppose an intended provision for the issue. A court of equity will deviate from the strict legal effect of the words of the articles, to effectuate this intent; but the operation of the principle seems to terminate in the securing an effectual provision for the issue of the marriage. After that is done, why should not the limitations operate according to their legal import?

Roberts v.
Kingsley,
1 Vez. 238.

In another case, where an estate was articulated to be settled on the husband for life, *sans* waste, remainder to the heirs male of his body, with power to raise portions for younger children. A settlement was afterwards made, before marriage, *in pursuance of the articles*, and observing the very words of the articles. The husband afterwards levied a fine to the use of himself in fee, and by will made a provision for his son's debts. Lord *Hardwicke* said it was the common case; the variation from the intent of the articles, and from the ordinary course of settlements not arising from any new agreement (being made *in pursuance of the articles*) but from mistake in not attending to a strict settlement. The reason of which was unanswerable, *viz.* that on a settlement for valuable considerations to make the father *tenant in tail*, would be nugatory, and the same as making him tenant in fee. But the son having submitted to, and taken

taken a benefit under his father's will, must be bound thereby; and therefore though he was intitled to have the settlement rectified according to the true intent of the articles, he could not retain both, but must make his election.

Vide 1 Brown
Chanc. Caf. 1
587. of elec-
tion in these
cases.

The word *issue* equally comprehends male and female. And therefore in a case of marriage articles for conveying lands in trust for the husband for life, and afterwards to the wife for life, and afterwards to the issue of the match, in such manner, and subject to such charges for younger children, as the husband should by deed or will appoint. Lord *Hardwicke* held that a daughter, the only issue of the marriage, was intitled, under an equitable execution of those articles, in strict settlement to an estate tail. *Issue of the marriage*, he said, included male as well as female; and therefore if it had gone no further than to the issue of the marriage, and a bill had been brought for carrying the articles into execution, the settlement must have been to *all the issue*; to the first and every other son, and for default of such issue, to the daughters, with proper remainders following one after the other; and that he had known several decrees of that kind upon the words *issue of the marriage*. And though by the words subjecting the provision to the father's ap-

Hart v.
Middlehurst,
3 Atk. 371.

Of the word
issue, vide
the cases re-
ferred to,
infra, 83.

Vid. 2 Atk.
73.

pointment, he might have divided the estate amongst the children ; a different part among the sons if he pleased, and another part by way of provision for the daughters ; still the *whole of the estate* must have been divided, though the *proportion* was left to the father.

This last case, we may observe, differs materially from that of "*Powell v. Price*," and rather classes with that of *West v. Errissey*. For here a provision was intended for the issue of the marriage, which included female as well as the male ; and *no other provision* was made for any of such issue male or female, than what was imported in the limitation to *the issue*, which embraced the whole estate comprized in it. Indeed it was the case of a limitation, that could not have intitled the father to an estate tail, even if the issue female had been otherwise provided for ; *issue* being, in *legal* construction, a word of *purchase*. Nor could the issue, either male or female, have taken at law, otherwise than as *purchasers*. It was a case, therefore, in which the *equitable* construction did not depart from the *legal* import of the word *issue*, in favour of issue otherwise provided for ; but enforced a construction, consonant to the legal import of the words, in favour of issue having *no other* provision than what that construction afforded them.

So

So in another case, where by articles previous to marriage it was agreed that 3000*l.* should be laid out in the purchase of a freehold estate, to be settled on the husband for life, remainder to the wife for life, remainder to the use of such issue of their bodies, in such parts and manner as the husband and wife should by deed or writing appoint; and for want of appointment, to the use of *the issue of their bodies*, remainder to the right heirs of the husband. There was no provision for younger children. The husband died without appointment, leaving his wife and two sons and a daughter. Upon a bill by the eldest son to have the money laid out, according to the articles, in land to be settled on him in tail, remainder to his brother and sister in tail, with reversion in fee to himself; and a cross bill by the younger children to have the lands to be bought settled on them equally with the eldest son. The Master of the Rolls was of opinion, that the lands to be purchased ought to be settled in strict settlement, and limited to the first &c. sons in tail, with remainder (the daughter being dead without issue) to the right heirs of the husband; and decreed accordingly.

Dodd v.
Dodd, Ambl.
Rep. 274.

The cases that have followed that of *Burton v. Hastings*, above cited, evidently appear, from what I have stated of them, to have done

(73)
Supra, p. 66.

done away the authority of Lord *Cowper's* opinion, when he dismissed the bill in that case. And it is observable, that in *Gilbert's* report of the case of *Burton and Hastings*, after stating that Mr. *Vernon* offered to the court a difference, where the settlement (made in pursuance of articles) was before marriage, and after, *viz.* that where it was before, the court could not interpose, as it could where it was after marriage: It is said, that the court had no regard to this distinction, but too hastily dismissed the bill.

(74)

Cas. Temp.
Talbot, 20.
Legg v.
Goldwire.

Lord *Talbot*, however, in a subsequent case, adopted the distinction urged by Mr. *Vernon* in that of *Burton and Hastings*; and laid it down as a rule, that where articles are entered into before marriage, and a settlement made *after marriage*, different from those articles, (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail) the court will set up the articles against the settlement. But where both articles and settlement are *previous* to the marriage, at a time when all parties are at liberty, the settlement differing from the articles, will be taken as a new agreement between them, and shall controul the articles. And although in the case of *West and Errissey* the articles were made to controul the settlement made *before marriage*,

riage, yet that resolution did not contradict the general rule; for in that case the settlement was expressly mentioned to be made *in pursuance and performance of the said marriage-articles*, whereby the intent appeared to be still *the same* as it was at the making of the articles.

So in the case of *Warrick v. Warrick*, hereafter cited, there were both articles and a settlement before marriage; but the latter was declared to be in *part performance* of the former.

Infra, p. 76.

Upon the whole, therefore, the general doctrine upon this subject appears to be; that, in the case of articles before marriage, containing limitations that would give the parents, or either of them, such an estate tail as would enable the father alone during the coverture, or the surviving parent afterwards, to bar the issue of the marriage, under a legal settlement limiting the estate in the same words, equity will rectify it, and make a strict settlement; unless the issue is otherwise provided for than by the limitation to the heirs &c. or from other limitations or provisions in other lands, it appears that the parties knew and intended the distinction. But that the court will not interfere, if both articles and *settlement* are made *before* marriage; unless

(75)

unless the settlement in *that case*, be expressed to be made *in pursuance of the articles*; for the court will suppose that the parties had altered their intention, with respect to the terms of the marriage; which they may do *before* the marriage, though not *afterwards*; and that the settlement was made in pursuance of such *new agreement*, and not of the articles. But when it is said to be made *in pursuance of the articles*, all room for such a supposition is precluded.

Here, however, we must remark, that the court will not in those cases relieve against purchasers for valuable consideration and without notice. As in the case of *West and Errissey* above cited, one of the objections to the appeal was, that if the articles should be allowed to controul the settlement, the purchasers under the husband would in consequence be affected; to which it was answered, that the appellant's bill was not brought against any *purchaser*, as to the parts of the estate sold by the husband; since the appellants only prayed satisfaction out of his personal estate. And, indeed, the decree was according to such prayer, and did not in the least affect any of the purchasers.—So in the case of *Powell and Price* above cited; it was admitted, that if the trustees (under the settlement) or second wife had *had no notice* of the

Supra, p. 66.

(76)

Supra, p. 69.

the articles made on the first marriage ; then their being *purchasers without notice*, would have been a bar to the plaintiff's claim by the articles.

And in the case of *Warwick v. Warwick*, before Lord *Hardwicke*, where articles were entered into for settling an estate to the husband for life, after his death to his intended wife for her life, and after her death to the use of *the heirs-male of the husband to be begotten on the body of the wife* ; afterwards, and before marriage, by a settlement declared to be in *part performance of the said articles*, the lands were settled upon the husband for life, then to the wife for life, and after her death to the use of *the heirs-male of the husband begotten on the body of the wife*. Afterwards the marriage took effect, and the husband suffered a common recovery, and mortgaged the land in fee ; which mortgage was afterwards assigned to another mortgagee. After the father's death, his eldest son brought his bill for an account of the rents and profits, and for possession, and to have the full benefit of the marriage-articles ; insisting that his father was intended to be tenant for life only, with remainder to his first and other son and sons successively in tail ; that he was a purchaser under those articles, and they ought to be considered as if they had been strictly

Warwick v.
Warwick and
Kniveton,
3 Atk. 291.

(77)

strictly carried into execution. The mortgagee denied notice of the articles, and insisted on his being a purchaser for valuable consideration. Lord *Hardwicke* said it was certainly true, from the general principles of the court, that if articles on marriage are to settle an estate to *A.* for life, remainder to his wife for life, remainder to the heirs-male of the body of *A.* it is taken in that court to be in *strict settlement*, and an estate for life only in the father and mother; and if the settlement be made after marriage, it shall be rectified by the articles before—that the case of *West* and *Errissey* was both upon articles and a settlement before marriage; and was the first case where the court altered a settlement, and made it conformable to articles, and relieved on the head of mistake, *the settlement referring expressly to the articles*. But that was between the parties to the articles and settlement, and their representatives, and mere volunteers; and had not been carried into execution against a purchaser—that it was

(78) true, the court had given relief against persons who claimed under the settlement and their representatives; but no case had gone so far as to relieve against purchasers.—He also observed, that there was no case, but where there are *articles as well as a settlement*, in which the court will construe words which make a legal estate-tail, to be carried into

strict

strict settlement. And upon the whole, Lord *Hardwicke*, after delivering his opinion that there was not sufficient proof of notice of the articles in the assignee of the mortgagee; dismissed the bill so far as it prayed to be relieved against the mortgage; but decreed that the plaintiff might be at liberty to redeem.

Here we may also notice a case, where the court refused to rectify a settlement according to articles, for want of the production of the articles themselves. The articles were previous to marriage, for settling, by the wife's father, certain estates to the use of the husband and wife for their lives, and the life of the survivor, and after the death of the survivor to the use of the *heirs of the body* of the husband on the wife, remainder over. A settlement was made after marriage *reciting* the articles, and said to be made in consideration of the marriage, and *pursuance and performance of the articles*. Upon a bill by a son of the marriage, to have the articles carried into execution, Lord *Hardwicke* dismissed it, for want of the articles being produced; by which alone, he said, he could alter the settlement. It was impossible, he said, for him to determine otherwise, unless the *whole of the instrument* was before him; for the true construction depended on *words*,
and

Cardwell v.
Makrill,
Ambl. Rep.
515,

and vide
Ambl. Rep.
148.

and *other parts* of the deed might be *material* to find out the true meaning. He could not see reason to lay it down as a rule, that in *all cases of articles*, the husband was to be only tenant for life.

White v.
Thornburgh,
2 Vern. 702.

There was a case of earlier date than several I have been noticing, in which, though the final decision did not directly turn on the execution of articles, but the aiding of a defective settlement, yet from its relation to the doctrine upon articles, I think it claims a place here. It was a case where the husband, upon his marriage, covenanted to levy a fine of freehold, and surrender copyhold lands to the use of himself for life, remainder to his wife for life, remainder to the heirs male of his body by his wife, remainder to the *heirs of their two bodies*. He afterwards died, without levying the fine or making the surrender, leaving a son and a daughter by his wife. The son afterwards, for indemnifying some sureties for him, covenanted to levy a fine of the freehold, and surrender the copyholds; and died having surrendered the copyhold; but without levying a *fine* of the freehold. Upon a bill by his sister and her husband to have the freehold and copyhold lands assured to her according to the *intent of the settlement*, Lord Harcourt considered the deed by the father in the *nature of articles*, to be executed
in

in a stricter manner than in the words of the deed, and that a *remainder* might be limited to the daughters; so that a fine by the sons could not have barred it. But upon a rehearing before Lord Cowper, he held that the settlement, by the deed to lead the uses of the fine, was not to be considered *as articles*, but a *defective settlement*, and the uses *not to be altered or varied*: But that a court of equity would *assist* it so far, as to consider it as if a fine had been levied (by the husband), and then the plaintiff would not have been barred *without a fine* (by her father), and she was to be considered as *heir of the body* of her father. And that the limitation in the deed to the heirs of the bodies, could be inserted for no other end or purpose, but to carry the estate to the *daughters of the marriage*; it being before limited to the *heirs male*; and therefore he confirmed the decree as to the *freehold*. But as to the *copyhold*, there appearing no particular custom in the manor for suffering a recovery, he held the surrender (by the son) would have barred the *intail*, in case the copyhold had been well settled; and therefore varied the decree, and dismissed the bill as to that.

Lord Cowper, we observe, considered the case, as of a *settlement defective only, for want of the fine and surrender*; which were the

Vide supra,
P. 72.

only requisites to substantiate the uses declared. And he accordingly only afforded the *aid* of the court, in supplying *that defect*; and consequently considered the son as taking an estate tail *from or through* his father, as he would have done, under a perfect settlement to the uses declared. But the observation that the words *heirs of their bodies*, could be inserted for *no other end* but to carry the estate to *daughters of the marriage*, appears to have been rather too loose; for those words would have let in a *daughter of the son*. And, according to Lord Cowper's principle of decision in that case, such a daughter (had the son left one) must, *as heir of the bodies of the husband and wife*, have been intitled, prior to, and in exclusion of the daughter of the marriage. For the estate tail, which was held to descend to the son's sister, because her brother did not bar it by a fine, would, for the same reason, have first descended to his daughter if he had left one.

It is obvious from the foregoing cases, that the general principle upon which the court of Chancery interposes, to carry marriage-articles into execution by way of strict settlement, notwithstanding the articles themselves are not penned in that manner, is, that articles made in consideration of, and previous to marriage, are considered as heads of agreement,

agreement, entered into between the parties upon valuable consideration; that a provision for the issue of the marriage, is one of the great and immediate objects of this agreement, and consequently a principal intention of such agreement must be, to secure such a settlement as shall contain an effectual provision for that issue: which end, it is clear, cannot be answered in any degree by a settlement so framed, as to leave it in the power of either parent alone, to bar their issue by fine or recovery.

(79)

The issue in these cases, are considered as claiming a provision in the capacity of purchasers for valuable consideration, under the purport and intention of the stipulated terms, upon which that marriage was engaged and which gave them birth. But it is evident the same obligatory considerations do not extend to wills: devisees, as such, are mere volunteers; their claim has no other ground than the intention and bounty of the testator; and consequently the terms in which that intention and bounty is expressed, may alone ascertain the nature and extent of their right. They have no claim arising from compact made upon valuable consideration, as the issue in the foregoing cases confessedly has. Therefore it is no wonder that we find frequent distinctions between wills and mar-

riage-articles, in regard to the effect of the limitation to the *heirs of the body* &c. after a preceding limitation to the ancestor.

(80)

² Vern. 536.
Sweetapple
v. Bindon.

Thus, where *A.* by will gave 300 *l.* to her daughter, to be laid out in land and settled to the use of her said daughter and her children, and if she died without issue, remainder over. The daughter married, and after her decease, a bill was brought by her husband to have the money laid out in land, and the land settled on him for life, as tenant by the curtesy, or to have the interest of the money for life in lieu of the profits of the land. The court held, that if it had been an immediate devise of the land, the daughter would have been, by the words of the will, tenant in tail; and consequently the husband would have been tenant by the curtesy; and that in case of a *voluntary devise, the court must take it as they found it*, and not lessen the estate or benefit of the legatee; although upon *the like words in marriage-articles it might be otherwise*, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the husband to have the interest for his life, as tenant by the curtesy.

Legat v.
Sewell,
¹ Eq. Abr.
395. Vide
this case,
infra, 117.

So upon a devise for the settling of lands on *A.* for life, and after his decease to the
heirs-

heirs-male of his body, and the heirs-male of the body of every such heir-male, severally and successively as they should be in priority of birth and seniority of age, remainder to B. In arguing the question, whether *A.* was tenant for life only or in tail, the common case of marriage-articles was cited, where, though they were so worded as to give the husband an estate-tail, yet the court had decreed a settlement on the husband for life only, and then upon the first and other son and sons, &c. Upon which part of the argument Lord Keeper observed, that where *settlements were agreed to be made upon valuable consideration*, the court would aid in artificial words, and make an artificial settlement: but he never knew it done *for a bare volunteer*.

(81)

And again, in a case where lands were limited by will *in trust* for *B.* for life, with leasing power, and after his decease *in trust* for *the heirs-male of his body*. Lord Keeper decreed an estate-tail to be conveyed to *B.* although he admitted that upon articles of marriage, founded on agreement, the husband in such case might be made only tenant for life; but in a will, (he said) *you must take words as you find them*. So in the case of *Trevor and Trevor* above cited, Lord Chancellor said, that upon articles the case was stronger than on a will.

Baile v. Coleman,
2 Vern. 670.
1 P. W. 142.
Infra, p. 90.

Supra, p. 62.

(82)

Caf. Temp.
Talbot. 20.
infra, 88.

Infra, p. 83.

2 Ark. 583,
in the case of
Bagshaw v.
Spencer,
infra, 84.

I have adduced the above instances in order to shew, that the practice of the court of Chancery, in respect to the construction of marriage-articles, is not, even in that court, admitted to be any authority for the like construction in the cases of wills; unless it be in certain cases where a will does not give the *legal* estate, but only creates a *trust* to be carried *into execution*. As to which, Lord Talbot in the case of Lord Glenorchy and Boswell, said, the rule is not generally true, that in *articles* and *executory trusts*, different constructions are to be admitted; that the case of *Papillon* and *Voice* was directly against that, and seemed to him a very strong authority for executing the intent in one case as well as in the other. And Lord Hardwicke carried the analogy still further in the case of *Bagshaw* and *Spencer*, by reprobating the distinction between trusts *executed* and *executory*, and treating all trusts as *executory*; a distinction, however, which seems to have had its weight as well in cases preceding, as others subsequent to that of *Bagshaw v. Spencer*, as will appear in the progress of these sheets.

We now come to those cases of trusts, other than marriage articles, in decreeing the execution of which, the court of *Chancery* has so far departed from that which would be the *legal* operation

operation of the words limiting the *trust*, if reduced to a common law conveyance, as to construe the words *heirs of the body of cestui que trust*, although preceded by a limitation for life to the *cestui que trust*, as words of purchase and not of limitation.

Those have been cases, where some clause repugnant to the nature of an estate-tail, shewed that the donor intended only an estate for life.—For a more particular view of the distinctions on this point, I shall refer to a future page. Infra, p. 93.

Thus, where lands were devised to trustees and their heirs for payment of debts and legacies, and afterwards, to settle what should remain unfold, one moiety to the testatrix's son *H.* and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son *F.* and the heirs of his body, with remainders over; taking special care in such settlement, that it should never be in the power of either of the sons to dock the intail of either of their moieties. Upon a question, whether the sons were intitled to have estates tail conveyed to them, or only estates for life, the court held, that the sons must be made only tenants for life, and should not have estates tail conveyed to them; but their estates for life should be without impeachment of waste. Because in that case an

Leonard v.
Earl of Suff-
sex, 2 Vern.
526.

estate was *not executed*, but only *executory*; and therefore the intent and meaning of the testatrix was to be pursued. She had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have, if an estate tail were to be conveyed to them. And the court took it to be as strong in the case of an *executory* devise for the benefit of the issue, as if the like provision had been contained in marriage articles; but had she by her will devised to her sons an estate tail, the law must have taken place; and they might have barred their issue, notwithstanding any subsequent clause or declaration in the will, that they should not have power to dock the intail.

(83)

2 P. W. 471.
Papillon v.
Voice.

And where *A.* devised a sum of money to trustees in *trust*, to be laid out in lands, and to be settled on *B.* *for life, without impeachment of waste*, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the *heirs of the body of B.* remainders over, with a power to *B.* to make a jointure.—The universality of the rule respecting the union of the limitation to the ancestor for life, with that to the *heirs of his body &c.* was urged in support of *B.*'s being intitled to an estate tail in the lands to be purchased. To which it was answered, that the rule in construction

construction of wills was, that the intention of the party ought to take place, however improperly expressed. That it would be a downright violation of the testator's intention, to construe the estate devised to *B.* to be an estate tail. For, 1st, the estate was devised to *B.* for *his life*, expressly; 2dly, it was to *B.* without impeachment of waste, which would be vain words if *B.* were to have more than an estate for life; 3dly, the estate was devised to trustees *during the life of B.* to preserve contingent remainders, so that the testator expressed his intention, that the remainders limited to the issue of *B.* should be contingent remainders; and what could be more contradictory to this express and plain intent, than to say those remainders should not be contingent, but give a vested estate tail to *B.* As to the notion that the conveyance directed by a will should be in the words made use of in the will, it was impossible that rule could universally hold: for suppose the direction of the will was, that the trustee should convey the lands to *A.* for life, remainder to *B.* for ever; this in a deed would not convey a fee, as it would in a will; and therefore there was no necessity that the words in the conveyance should pursue those in the will. So if the words of the will had directed the estate to be conveyed to *A.* for life, remainder to the issue of his body (he having none at that time born)

Vide *Earl of Stamford v. Sir John Hobart*, infra.

born) this would be an *estate tail* in a will, but in a *deed* it would not be so. Again, if the words in a will were that the *conveyance* should be to *A.* and his heirs male, this would be an estate tail; but put such words into a *deed*, and there, for want of saying of *whose body* the heir must be, they would give a fee simple; to which the court agreed. And the Lord Chancellor *King* declared the court had a power over the money directed to be invested in land: that the diversity was between the will's passing a *legal* estate and leaving the estate *executory*, so that the party must come into the court of *Chancery*, in order to have the benefit of the will; that in the latter case, the intention should take place, and not the strict rules of law; and he decreed that *B.* should have but an estate for life on the lands to be purchased.

Lord Glen-
norchy v.
Bosville, Caf.
Temp. Talb.
3-

In another case, of a devise to trustees and their heirs, in trust, till the marriage, or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance, and as to the residue to pay his debts and legacies, and after payment thereof in trust for his grand-daughter; and if she married a Protestant, after her age, or with consent &c. then to *convey* the estate after such marriage to the use of her for life, *without impeachment of waste*, remainder

remainder to her husband *for life*, remainder to the *issue of her body*, with several remainders over. A question arose, whether under the will the testator's grand-daughter (Lady Glenorchy) was tenant *for life* or *in tail*; which depended on two points. First, whether the words of the will, in an *immediate devise* of a legal estate, would have carried an estate tail; secondly, if so, whether the court would make any difference between a *legal title* and a *trust estate executory*?

Lord Talbot said, he should upon the first question have made no difficulty of determining it an *estate tail*, had it been the case of an *immediate devise*. He thought, in cases of *trusts executed*, or immediate devises, the construction of the courts of law and equity ought to be the same, for *there* the testator did not suppose any *other conveyance* would be made. But in *executory trusts* he left something to be done; the trusts to be *executed in a more careful and more accurate manner*. That in the case of *Legat and Sewell*, the words, if in a settlement, would have made an *estate tail*, and in that of *Baile v. Coleman*, the execution was to be of the *same estate he had in the trust*, which, in construction of law, was an estate tail. That the case of "*Papillon and Voice*" seemed a strong authority for executing the intent in *executory trusts*, as well

Supra, 80.
Infra, 117.

Supra, 81.
Infra, 92.

as in articles ; and he accordingly decreed the Lady *Glenorchy* but an estate for life, with remainder to her first and other sons &c. This, we observe, was the case of a limitation *to the issue* &c. which is not, even in legal construction, so appropriated a word of *limitation*, as the word *heirs*. But Lord *Talbot's* reasoning applied to both, and brought them alike within the distinction taken by him, between *trusts executory* and *immediate devises*.

In the last cited case, that of *Earl of Stamford v. Sir John Hobart*, was resorted to, in order to shew that the court was not tied up to the rules of law in cases of *executory trusts* ; and though such case does not rank as one of those in which the court of Chancery has deviated from the rule in *Shelley's* case, because the limitation to the *heirs male* of the body there was preceded only by *a term of years*, and not by a *life estate* in the ancestor ; yet, as it is one of the cases in which the court has executed a *trust for heirs male*, in a course of *strict settlement* on first and other sons successively in tail male, at the same time that it is a strong and leading authority for the corrective interposition of equity, in modelling the limitations of *executory trusts in wills*, no less than in *marriage articles*, in such a manner as to substantiate the apparent intention, I think it claims our proper attention in this place.

The

The case arose on Sir *John Maynard's* will; by which, after devising his estates in remainder after the decease of his wife (afterwards *Countess of Suffolk*) to trustees and their heirs, he directed them, *after his wife's decease*, to convey certain parts thereof to the use of, or in trust for, Sir *H. Hobart* and *Elizabeth* his wife for their lives and the life of the longer liver of them; the remainder to the *first son* of the said *Elizabeth* for *ninety-nine* years, if he should so long live; the remainder to the *heirs male of the body of such first son*; the remainder to all and every the sons of the said *Elizabeth* for 99 years, if every such son respectively should so long live; the remainder to the *heirs male* of every of them, to take, not jointly, but successively, one after the other, according to the births of each of them; each son to take the term of 99 years, with *immediate remainder to his said heirs male*; the remainder thereof to *Mary Maynard* (afterwards *Countess of Stamford*) for her life; the remainder thereof to all and every her sons for such like term of 99 years, and with remainder to the heirs male of the body of every such son immediately after each term. The testator left the said *Elizabeth Hobart* and *Mary Maynard* his grand-daughters and co-heirs at law, who neither of them had any issue male at the time of his decease. Afterwards, on some disputes between Sir *H. Hobart* and his Lady, Lord

Stamford

Earl of
Stamford v.
Sir John Ho-
bart, 1 Brown
Parl. Cas.
288.

Stamford and his Lady, and the Countess of *Suffolk*, an act of Parliament was obtained, whereby it was enacted that the real estate, by the said Sir *John Maynard's* will given or appointed, should go unto, and be held and enjoyed by such person and persons, to and for such estates and interests, and under and subject to such charges limitations and appointments, and in such manner and form, as was in the said will expressed. And the said trustees were thereby authorised and impowered to convey the said manors and lands immediately, unto such person and persons, and for such estate and estates, as the same were in and by the said will limited and appointed to be conveyed, as if the said Countess of *Suffolk* were dead.

After the decease of Sir *H. Hobart* and his wife, upon a bill filed by Sir *John Hobart*, their only son, the trustees were directed to convey the lands according to his will and the words of the act of Parliament. And a draft of conveyance being accordingly settled by the Master to trustees, *habendum* to them and their heirs. To the several uses, intents and purposes in the said will and act of Parliament limited expressed and declared, and to and for no other use, intent or purpose whatsoever; the plaintiff excepted to it, for that the premises ought, at least, to have been limited to the use of the said trustees and their heirs; and only in
trust

trust for such person and persons, and such estate and estates, as were in and by the said will and act of Parliament limited; whereby the *legal estate* might be vested in the said trustees, for the better preservation of the *contingent limitations*, which otherwise, as the draft was prepared, were liable to be destroyed, and the testator's intention plainly defeated.

Upon hearing of this exception, Lord Chancellor Cowper declared, "that in matters *executory*, as in cases of articles, or a will *directing a conveyance*, where the words of the articles or *will* were improper, or informal, that court would not direct a conveyance according to such improper or informal expressions in the articles or *will*; but would order the *conveyance or settlement* to be made in a proper and legal manner, so as might best answer the *intent* of the parties; and in that case his Lordship conceived the true intent of the will to be, that the estates should be *secured*, as far as the rules of law would admit, to the issue male of the respective devisees, and that it was designed to be as strict a settlement as possible by law." His Lordship therefore decreed, that in the said conveyance, where any part of the estate was limited in use to the plaintiff for 99 years if he should so long live, there should be a limitation over
to

to trustees and their heirs *during his life*, to preserve the contingent uses in remainder; and then to the first and other sons of the plaintiff in tail male successively.

Upon an appeal to the Lords from this *last decree*, it was contended, among other things, that the act of Parliament, which was so very express in confirming the estates appointed by the will, could never intend that a court of equity, should have power to *direct* a conveyance to *other uses*, than what were *mentioned in the will*; but the decree complained of did so, and was therefore repugnant both to the will and act of parliament, as well as to the *former decree*.—To this it was answered, that in cases of *executory articles*, for the settling of estates, in prospect of *future conveyances* to be *afterwards made*, it was usual for courts of equity to help informalities and supply defects; especially when the things supplied were necessary to *support the main intent* of the parties, and to carry such articles into execution, according to that intent, so far as it might agree with law, though not strictly according to the words and penning of the articles; and *a fortiori* would courts of equity do so in the case of *a will*, where the same was only *executory* by a *conveyance to be made*. That the act of parliament made *no alteration* in the *will*, in the point in question; it only hastened the
the

the time for the trustees to convey, even in the life-time of *the Countess of Suffolk*, and in some other particulars not relative to the question. But in all other respects, the act confirmed the will, and being strictly relative to it, the intent of the will ought to be the rule for the conveyance. The decree was accordingly affirmed by the Lords.

In a case where one by deed conveyed his freehold land to trustees and their heirs, and his leasehold to trustees and their executors, upon trust to apply the rents and the benefit of the redemption to *W.* for life, and after her death to the heirs of the body of the said *W.* and of *G.* and of *M.* their heirs, executors and assigns, during the continuance of the estate in the premises; upon a question whether *W.* took for life, or in tail, Lord Talbot held, that she took an estate for life, and that the heirs took by purchase. In which case, we may observe, the limitation to the heirs of the body of *W.* was blended with that to the heirs of the bodies of several others, who could take no otherwise than by purchase; and there were words of limitation not only to the heirs, but to the assigns of all the said heirs of the bodies alike.

Allgood v.
Withers, in
Chanc. in
1735, cited
2 Bur. 1107
1 Vez. 150.
2 Atk. 582.
2 Vez. 648.

and vide
Ashton v.
Ashton, cited
1 Vez. 147.
2 Atk. 582.

I shall next notice a case, of very frequent reference; where *A.* devised lands to five

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trustees,

(84)

1 Vez. 142.
2 Ark. 246.
570. 577.
Bagshaw v.
Spencer.

trustees, their heirs and assigns *in trust*, by rents and profits, *sale or mortgage*, to pay his debts &c. and *after payment thereof*, he devised the same estates to three of the same trustees their executors &c. for 500 years, upon trust to pay his legacies, and an annuity of 200 *l. per ann.* to his sister for life; and after the determination of the said estate for years, he devised the same premises to all the said trustees and their heirs in trust, as to a moiety, to the use of *T.* his nephew for life, without impeachment of waste, and after the determination of that estate, to the trustees and their heirs during the life of *T.* to support contingent remainders, and after his decease to the use of the heirs of the body of *T.* lawfully begotten, and for want of such issue, then to the use of his nephew *B.* for the term of his *natural life*, without impeachment of waste, and after the determination of that estate, *to the same trustees during the life of B. to preserve contingent remainders*, and after his decease, then to the use of *the heirs of the body of B.* lawfully begotten, with like remainders to other nephews.

(85) The first devisee *T.* died without issue; upon whose decease *B.* the next in remainder, filed his bill against the trustees and all proper parties; praying, amongst other things, to be let into possession of a moiety of the estates; afterwards

afterwards *B.* dying pending the suit, his widow and devisee brought a bill of revivor and supplemental bill ; charging that *B.* in his life-time, by bargain and sale inrolled, conveyed this moiety of the estates to two persons and their heirs, to make them tenants of the freehold, and suffered a recovery thereof (in which he was vouched) to the use of himself in fee ; and afterwards devised his said moiety to his said widow in fee, and died without issue. The general question between the parties was, whether an *estate-tail* or an estate for *life* only, passed by the will of *A.* to *B.*?

It was insisted for the plaintiff, that it was an estate-tail ; upon the general rule, that where lands are limited to a man for life, with a limitation in the same deed or gift to the heirs of his body, that this makes an estate-tail, and that a devise of lands in the same way passed the same estate ; that the limitation was either a *legal estate*, or a *trust vested or executed* and not *executory*. On the other hand it was contended, that those rules were artificial, not founded in justice, but for support of the feudal tenures, and therefore the judges ought to shew themselves *astuti* in supporting exceptions to such rules. The Master of the Rolls, however, held it to be a *trust*, and not a *legal estate* ; but decreed that *B.*

(86)

was entitled to an *estate-tail* in the moiety so devised to him ; as it was the case of an immediate devise, and not a devise of lands to be settled.

Upon an appeal to Lord *Hardwicke* from this decree, he agreed that this devise was only a *trust* in equity ; the devise being to *trustees and their heirs*, which carried the whole fee in point of law, and the devise to *sell* being sufficient to carry the fee, if the word *heirs* had been omitted ; and therefore the whole fee being in the trustees, no *legal* remainder could be limited to *B.* ; and as to its being considered as an *executory devise* to *B.* (which, it seems, had been contended at the bar) it was too remote to be good in that view ; being after all debts indefinitely paid, which, in point of time, might exceed a life or lives in being, or any other time allowed by law ; and besides, in *that case* the recovery by *B.* being before the debts were paid, and consequently whilst the legal fee remained in the trustees, *B.* could make no good tenant to the præcipe ; and that would prevent its passing by *B.*'s will : for whatever made that recovery void, equally defeated the plaintiff's title ; which made it necessary for the plaintiffs to admit that all the devises subsequent to that to the trustees were *trusts* in equity.

That

(87)

That the main question, whether it was an equitable *estate-tail* or for *life* only, depended on the construction of the words *heirs of the body*, whether they should be taken as words of limitation or of purchase.—That the intent was clear that they should be taken as words of purchase, from the clause *without impeachment of waste*, and the limitation to trustees *to support contingent remainders*. That there were several cases even at law, where they had been taken as words of purchase, as *Archer's case*; that the words of limitation added there, and in all such cases, were only demonstration of the intent of the testator in using the first words. That the case of *Colson and Colson*, which was objected as an authority, that the interposition of trustees to support contingent remainders is not sufficient, to turn these subsequent limitations to the *heirs of the body*, into words of purchase, differed from the principal case; here being (in the principal case) a clause without impeachment of waste; although that might be thought of little weight; but the *great difference* was, that THIS was a devise of a TRUST in equity, THAT of a mere LEGAL estate, the words of which must be taken as they stood, according to the strict legal determination. That here all the limitations were the direction of a trust, which the court was bound to carry

Vide Colson
and Colson,
infra, p. 121,

- (88) into execution according to the intent of the testator.

Vide of this distinction, and further observations on this case, *infra*, p. 93,

and vide Lord Hardwicke's observation on this case in *Garth v. Baldwin*, 2 Vez. 655.

That as to the difference between trusts *executed* and *executory*, the distinction had never been established by any direct resolution. That all trusts in notion of law were *executory*, and to be carried into execution by the court by *subpœna*. That if *B.* had himself come to have a conveyance decreed him, the question would have been, whether the court should have inserted trustees to support contingent remainders, if they had not, they would have departed from the words of the will; if they had, the remainder must have been to first &c. son and sons in strict settlement, for otherwise there would have been no remainders to be preserved; and therefore, if the court must at all events depart from the words of the will, such departure must rather be to support than to frustrate the plain intent of the testator; for these reasons Lord *Hardwicke* reversed so much of the decree at the Rolls as gave *B.* an estate tail under the will.

It seems, this decree of Lord *Hardwicke* was expressly grounded on the distinction between a *trust* in equity and a mere *legal estate*; he holding that in the *latter* the words *must* be

be taken as they stood, according to their strict legal determination.

(89)
From the example of the courts of equity in those cases of *trust* limitations, where they have denied the application of the rule in *Sbelley's* case; some people, with more plausibility than reason, have endeavoured to infer, that the courts of law should indulge the same latitude of construction; assuming it as a principle; that there is no sound distinction between the devise of a *legal* estate and a *trust*. But this seems to be *petitio principii*. That our books abound with the distinction, between a *legal* devise and a *trust*, when *executory* at least, appears as well from the cases I have already mentioned, as from those which I shall mention by and by. In the mean time, as to the soundness and reason of the distinction, we are to consider, that *trusts* were originally creatures of confidence between party and party, and totally distinct in almost every quality, from those *legal* estates which were the subjects of *tenure*. They were in their nature independent of *tenure*, and therefore not the objects of those laws which were founded in *tenure*. They were rights arising solely out of the *intent* of the party who created them; and therefore such intent was the *great guide* in the *execution* of them. Consequently, when a court of equity, in

(90)

certain cases of *trust-estates*, deviates from the rule above laid down ; it does not in so doing, depart at all from any rule of *law* by which it was *ever bounden* : it only exercises that conscience and discretion to which *trust-estates* were in their nature originally and necessarily subject.

And yet even our courts of equity, in order to preserve as near a correspondence as may be, between the rules of construction, with regard to *trust-estates*, and those laws by which legal estates are construed, considers itself as bounden, even in the case of *trust-estates*, to decree according to the rule I have been speaking of, wherever it can be done without manifest violation of the intention of the parties. Of this the case of *Sweetapple v. Bindon*, above stated, is a strong instance.

Sweetapple
v. Bindon,
supra, p. 80.

And where one devised lands to trustees and their heirs for payment of debts and legacies, and after debts and legacies paid, willed that one fourth part should be and remain in trust for *E.* for life, with power of leasing ; and after her decease in trust for *C.* *for and during the term of his life*, with like power of leasing, and after his decease to the heirs male of the body of *C.*, remainder over. Now this was the devise of a *trust* ; and Lord Cowper conceived that it differed from an *immediate devise*, and that it was rather to be looked upon
in

Bale v. Coleman, 2 Vern.
670. 1 P.
W. 142.

(91)

in the nature of an executory devise, to take effect after debts paid, which were considerable; or in nature of marriage-articles: besides, that the enabling C. to make leases, seemed to imply very strongly, that he was to have no power to dispose of the inheritance. But the cause coming on before Lord *Harcourt* upon a re-hearing, he said the case of a will differed from the several cases of marriage-articles, in the nature of which the issue were particularly considered, and looked upon as purchasers. That in cases of a will, where the parties claim voluntarily, the testator's intent must be presumed to be consistent with the rules of law; that at law those words would certainly create an estate-tail; and it could not be inferred (with any certainty) from the power of leasing, that no estate-tail was intended; such power being more beneficial than that given to tenant in tail by the statute; and as the debts were admitted by the pleadings to be all paid, the same construction was to be made as if there had been originally no trust; and so decreed A.'s share to be conveyed to him and the heirs male of his body, remainder over.—The above state of the case of *Bale and Coleman*, is from *Vernon*. *Peere Williams* states it as a devise to four persons for payment of debts, afterwards to the use of them and their heirs; and that the testator by codicil devised that

1 P. W. 142.

that his will should stand, saving that one of the said devisees should have his estate for life, with power of leasing, remainder to the heirs male of his body. But considering the first devise for *payment of debts*, the devisee's *beneficial* interest in either state of the case, appears to have been in the nature of a *trust*.

Garth v.
Baldwin,
2 Vezey,
646.

(92)

So where there was a devise of lands to a trustee, *in trust* to pay the rents and profits to S. for her separate use for life, as if she were sole; and after her decease to pay the same to E. *her son for life*, and afterwards to pay the same *to the heirs of his body*, and for want of such issue, to pay the same to all and every other son or sons of the body of S. begotten &c. Upon the question whether E. was intitled to the lands in tail or for life only, Lord Hardwicke proceeded on this principle, *viz.* that in limitations of a *trust*, either of a real or personal estate to be determined in that court, the construction ought to be made according to the construction of limitations of a *legal* estate, unless the intent of the testator or author of the trust *plainly* appears to the contrary. He laid it down as a rule (he said) that he was not, in a court of equity, to over-rule the *legal* construction of the limitation, unless the intent of the testator or author of the trust appears by declaration plain, that is by *plain expression* or *necessary implication*.

plication. And upon this ground Lord *Hardwicke* decreed a conveyance in tail to *B.* of the real estate so devised. — *N. B.* In this case Lord *Hardwicke*, in considering the above case of *Bale* and *Coleman* then cited at the bar, observed, that a tradition prevailed, that Lord *Harcourt's* decree in that case was afterwards affirmed by Lord *Cowper* himself; but he said, that was not the fact; though he believed it was afterwards cited before Lord *Cowper*, and that he spoke to that effect. And Lord *Hardwicke* said, the case of *Bale* and *Coleman* had never been denied to be law or a rule of that court, and that he thought it was right to adhere to it.

Vide 2 *Ve-*
zey, 657, 8.

(93)

So in a case before Lord Keeper *Henley*, where testator devised to trustees and their heirs upon trust, after his death, by and out of the rents and profits to raise 500 *l.* with interest, and pay the same to his five grandchildren; and subject to the raising and paying the said 500 *l.* and the interest thereof, to the use of his nephew *Thomas Rayney* for life; subject nevertheless to his nephew's qualifying himself according to a proviso therein after contained, with remainders to the said trustees and their heirs to preserve contingent remainders, with remainder to the use of the heirs male of the said *Thomas Rayney* and their heirs, provided that, in case his said nephew,

Wright v.
Pearson, in
Canc. June
5, 1758.
Vide same
Case, Ambl.
Rep. 358;
but Lord
Keeper's
argument
not quite so
particularly
stated.

See also J. C.
in Brown
vs. Rep.
66.

Thomas

Thomas Rayney, should die without *having any issue male of his body living at his death*, then he charged the premisses with 100 *l.* a-piece to two nieces, if then living, at their respective ages of 21 years; if either died, her part to go to the survivor. And he impowered his said trustees, as soon as conveniently could or might be after the death of the said *Thomas Rayney without issue male as aforesaid*, by and out of the rents and profits of the premisses to raise and pay to his said two nieces the said 100 *l.* a-piece; and for default of *such issue male of the said Thomas Rayney*, then he devised the premisses (subject to the payment of the said 500 *l.* and 200 *l.*) to the use of all and every his said five grand-children, or such as should be *living* at the time of failure of *issue male of the said Thomas Rayney*, to take as tenants in common, and to their respective heirs and assigns, equally to be divided between them share and share alike, provided that the said *Thomas Rayney* should immediately after the testator's death be placed out an apprentice to a surgeon, or some other good trade for seven years, or else be sent to some college in *Cambridge*, there to continue till he was qualified to be ordained a clergyman; and in case he should refuse or neglect to be put out and continue such apprenticeship, or qualifying himself to be ordained a clergyman, then his will was, that

that the estate so before limited to the said *Thomas Rayney for his life*, should cease and determine and be void, as if he had been dead, and that the said premises so limited to the said *Thomas for his life*, and his *issue male* as aforesaid, should from thenceforth revert over, and go and remain to the use of such of his five grand-children as should be living, to be equally divided amongst them, and to their respective heirs as tenants in common.

The testator died in *February 1740*.

Thomas Rayney died without issue in 1748, having suffered a recovery of the premises.

Lord Keeper, after stating the case, observed, that the first question was, whether *Thomas Rayney* took an estate for life or an estate tail? which he said introduced another question, Whether the *issue* of *Thomas Rayney* was intended by the testator to take an estate in fee by *purchase*, or an estate by limitation from the father in tail? And that a third question was, Whether that was a *trust*, or an *use executed*?

As to the third question, which Lord Keeper said he should consider first; it had been said, that was an *estate executed*, and that

the trustees had only a chattel, *quousque*, for which had been cited *Carter* and *Barnardiston*, 1 *W.* 505. *Hitchins* and *Hitchins*, 2 *Vern.* 403. But those cases, he said, did not apply, for in both the estate devised was only an *uncertain interest*, and therefore a chattel. But where it is a *certain interest*, he said, the court could not declare it a chattel, or any other estate than *what is devised*. That if lands are devised to *A.* for life to pay debts, the court cannot construe it a chattel; much less if the devise is to *A. in fee*; for it would be *changing the trustees*, contrary to the intent of the testator, as the personal representatives might become the trustees, instead of the heirs at law; and he referred to *Bosworth* and *Farrand*, *Cart.* 96. That reasoning, he said, was confirmed by Lord *Hardwicke*, in *Bagshaw* and *Spencer*; though indeed there was in that case the additional circumstance, that the trustees might sell.

Vide *Carter*,
107.

He was therefore of opinion, that it was a *fee in the trustees*, and not executed by the statute of uses in any of the subsequent limitations.

But he thought THAT was not very material in the principal case, as by that will the trusts were *fully limited and declared*. For he thought it very dangerous that a different construction should be put upon words of limitation

mitation in cases of *trusts* and *legal* estates, except where the limitations were *imperfect*, and something seemed left to be done by the trustees in the first place; and consequently, SECONDARILY by that court. He said, that Lord Hardwicke relied more on the intent of the testator, in the case of *Bagshaw* and *Spencer*, than on that distinction.

This brought him to the two questions, Whether the heirs male of *Thomas Rayney* took a fee as purchasers, or in tail, under the limitation to the father?

The testator, he said, was disinheriting his heirs at law, to preserve his name; and yet they supposed he was giving a fee to the children, under which the *daughters of a son* might take, contrary to that intent. The testator's intent, he said, seemed to be, to make a settlement of his estate; and on failure of issue male of *Thomas*, he had limited a remainder over to his five grandchildren; and therefore his intention was manifest to give such issue male a particular estate, and not a fee.

That, the Lord Keeper said, was *cardo causæ*. It had been objected, that by the proviso the limitation was confined to the issue male of *Thomas* living at the time of his death.

After

After the limitation for life, the next was to the *heirs male*; and then the proviso was added. But the proviso was *collateral* to the limitations, and broke the thread of them; which after the insertion of that proviso, was again resumed. And it was argued that the words "and for default of such issue male" related to the issue male living at the time of *&c.* as mentioned in that proviso, so as to make the limitation over to the grand-children an executory devise. But he could not think *that* a good rule of construction of the will; but that the thread of limitations should be taken uninterrupted, and then it would stand thus: To the trustees and their heirs to raise *&c.* then to *Thomas* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of *Thomas* and their heirs, and for default of such issue, remainder to the five grand-children and their heirs as tenants in common. And that by such construction the words "and for default *&c.*" would refer to *heirs male* before mentioned, and the proviso would be detached; which he said seemed to be the true and rational construction of the will; for it was absurd to construe it to be limited to the issue male *living &c.* But if the proviso were taken in a *parenthesis*, it gave the whole will a sense agreeable to the testator's intent.

As

As to the first question, whether it was an estate tail, or for life only in *Thomas Rayney*? Lord Keeper said, the words "heirs male, &c." as placed in the will, seemed words of limitation, and not of purchase. That suppose the will had stopped at these words, it was admitted it would have been an estate tail, according to *Shelley's case*, 1 *Co. Rundale* and *Eely, Carter* 170. That the case of *Coulson* and *Coulson* confirmed that; only it separated the estate tail from the estate for life, by the interposition of trustees to preserve contingent remainders; which seemed a distinction without a difference.

Vide infra,
141, 114.

Several cases, he said, were cited in *Bagsbaw* and *Spencer*, of words of limitation superadded; which turned words of limitation into words of purchase; all founded on the principle of *Archer's case* (for he did not rely on the word "heir" in the singular number); in all the cases of which sort there had been some words, as "*next &c.*" which had been descriptive of an individual, and made them properly words of purchase.

That in the case of *Bagsbaw* and *Spencer*, by the insertion of trustees to preserve contingent remainders, the court held the words "heirs of the body" words of purchase. — They were also construed words of limitation

in the same case. That case, he said, was the case of a trust, as the principal one was; and that Lord *Hardwicke* did, upon that ground, and the limitation of the other moiety of the estate to the *Spencers*, and other circumstances in the case, which shewed the intent of the testator plain and clear, construe it to be only an estate for life in *Bagsbaw*, *contrary to the former determinations*. He did it on the plain intent of the testator; and in so doing assumed no more power than every court of law had.

Lord Keeper said, that he proceeded on the same principle himself; and thought that *Thomas Rayney* took an estate tail from the intent of the testator, who plainly intended the heirs male &c. should not take an estate in fee, which they must if they took as purchasers. He was considering, he said, whether he could not make this construction: *viz.* to *Thomas* for life, then to his heirs-male in tail, then to the grand-children. And if the limitation had been, for default of such heirs of the body, he might have considered it as heirs of the body of the heirs male &c. mentioned before; but the limitation there was for default of such issue male &c.

Vide Keene
v. Dickson
infra 558.

He thought, he said, the words "*and their heirs*," in that will were redundant and superfluous,

pluſage, and that *Thomas Rayney* took an eſtate tail; and conſequently that the recovery ſuffered by him was good; and though it was a rule never to reject words in a will, if they could ſtand, yet that he *muſt* do it in that caſe to ſupport the teſtator's *intent*.

That the ground of his determination was, the manifeſt intent of the teſtator; and therefore on the whole he was of opinion, that *Thomas Rayney* took an eſtate tail, and not an eſtate for life only, under that will; and that the recovery was well ſuffered by him; and the defendants under it were well intitled to the eſtate.

The contrast in the complexion of the two laſt noticed *decisions*, is ſo ſtriking, that one is almoſt ſurprized at Lord Keeper *Henley*'s attempt to throw a veil over it; and to reconcile his own deciſion in the latter caſe, to the principle upon which Lord *Hardwicke* proceeded in the former. Notwithſtanding all due credit to his addreſs, a cuſtory comparison of the ingredients of the two caſes, I think, ſhews the latter to have poſſeſſed no leſs, but even ſtronger arguments in favour of the heirs taking by *purchase*, than the former did. In both caſes there was a deviſe *in fee* to truſtees for payment of *charges*; both were therefore avowedly *equitable eſtates* in

the *cestui que* trust, and not legal estates executed in them; of consequence both were equally open to the construction of a court of equity, upon the circumstances of intention. An express limitation to support *contingent remainders* occurred alike in both; and of course all the arguments founded by Lord Hardwicke on *that circumstance* in the case of *Bagsbaw* and *Spencer*, were applicable with equal force in the case of *Wright v. Pearson*; with the additional weight in the latter case, of arguments there afforded by the words of *limitation in fee*, annexed to the words *heirs male*, &c.; and the probable ground for the constructive restriction of those words, to heirs male *living at the time of the parent's decease*, furnished by the *express words* of the interposed proviso. Two circumstances, whose implicative force, the Lord Keeper felt himself called upon for some exertion to obviate.

To remove the fair implication on the words of the proviso, he found it requisite to new model the context of the will; by transplanting the clause which afforded it, to a different place from that which the testator had given it; and by its removal, opening a reference of the words in default of *such issue &c.*, which seemed excluded by that clause as it stood in the will. And to avoid the effect of the words

words *and their heirs* superadded to the words *heirs male*; he expunged them intirely. — These constructive modifications were not of the gentlest touch; and whilst the one passes over in silence, the auxiliary implication, from the ultimate limitation over to the grandchildren *living at* the failure of the issue male spoken of in the preceding limitations, the other was not perfectly reconcileable, with the stress before laid in the same argument on the words *their heirs*, against the construction of the heirs male &c. taking by purchase. — The words *their heirs*, the Lord Keeper said, would not permit him to *construe* the words heirs male, &c. *words of purchase*, without giving them *the fee*; which would have been inconsistent with the subsequent words, and in *default of such issue male*. But could he give the words *heirs male &c.* the effect of words of *limitation*, in consistence with the same words, *and their heirs*? He thought not, and discarded those words by expressly treating them as words of *surplusage*. The same stroke equally removed the supposed obstacle to the other construction; and, letting in the arguments from *Bagshaw* and *Spencer* for it, left the turn of the scale between the two, to the operation of *other motives*. Whilst it was equally necessary to reject the words *and their heirs*, under either of two constructions, they were no more an obstacle to *one* than to the

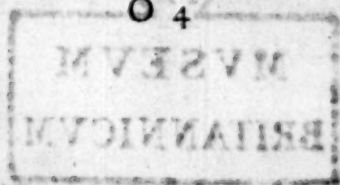
Vide distinction between this and King v. Burchel, infra, 124.

other; and the removal of them reduced both constructions to a level, in respect to the influence of *those words*. And it is obvious that the rejection of the words *their heirs*, at once annihilated the argument raised on the chance of descent to a daughter of a son, in opposition to the presumed intention of the testator to preserve his name. For putting the words *their heirs* out of the case, the daughter of a son could not have taken; whatever the son of a deceased daughter, being *heir male*, might have done; which, however, was not adverted to; nor, considering the testator's preference of males, could that, I think, be urged as militating with his general intention.

I have entered into my present observations, on the case of *Wright v. Pearson*; with a view of setting that case in its true light; in respect to the real tendency, and extent of its authority, among the cases relative to the application of the rule I am treating of, in devises of mere *trust* estates. However studiously Lord Keeper affected, in *words*, a concurrence with Lord Hardwicke's doctrine in *Bagshaw v. Spencer*; he, in *fact*, struck it to the root, by a direct contrary decision, in a case that more obviously courted its admission. At the same time that we must see, the express disinclination of the court in *Wright v. Pearson* to quarrel with the case of *Bagshaw*

Bagshaw v. Spencer, we cannot be insensible to the declaration of the same judicial voice, of its being *very dangerous*, that a different construction should be put, upon words of limitations in *trusts* and *legal estates*; except where the limitations were imperfect &c. and that upon the clause for preserving contingent remainders, and other circumstances in *Bagshaw v. Spencer*, Lord Hardwicke construed it only an estate for life, *contrary to former determinations*. To what could such principles lead, but a decision contrary to that in *Bagshaw v. Spencer*, which was expressly founded on the distinction between *trusts* and *legal estates*? A stronger case could scarcely be imagined, scarcely wished for by the most zealous assertors of the rule, than that of *Wright v. Pearson*. It was the case of a *trust*, involving at once an express limitation to preserve contingent remainders; a reference to issue male living at the time of the decease; a restriction of failure of issue male to the life-time of persons *in esse*, and a limitation *in fee* annexed to the word heirs of the body. Under all this combination of oppugning circumstances, the rule prevailed. Is it in the reach of sophistry to reconcile such a decision with that in *Bagshaw v. Spencer*? Well might a great authority, I mean the present Chancellor, observe,

that



1 Brown
Canc. Cas.
216.

that he did not see how the two cases could stand together.

In a subsequent case, Lord Keeper *Henley* proceeded on the same analogy of construction, between the limitations of *legal* estates and *trusts*.

Austen v.
Taylor.
Amb. 376.

A testator, after giving certain lands to trustees and their heirs, in the first place, to the intent his sisters should respectively have an annuity, or rent charge of 80*l.* for their lives, with power of distress and entry, and subject thereto in trust for *P.* for life, remainder to *trustees to preserve &c.* remainder to the *heirs of the body* of *P.* remainder to his own right heirs; gave the residue of his personal estate to trustees, in trust to buy lands in fee-simple; which he directed should remain, continue, and be to, for and upon such and the like estate and estates, uses, trusts, intents and purposes, and under and subject to the like charges, restrictions and limitations, as were by him before devised, limited and declared, of and concerning his lands and premises therein before last devised, or as near thereto as might be, and the deaths of persons would admit. Upon a question whether *P.* was intitled to an estate for life, or in tail, in the lands to be purchased.

—The



—The Lord Keeper was of opinion, that in the case of *imperfect trusts* only, that court could make a different construction from a *legal* limitation. In that case, he said, there was no *reference to the trustees*; without that ingredient, he did not find any case where the court had given a different meaning from what a court of law would, on a legal limitation. Nothing was left to the trustees to be done, but to buy the land. The testator had declared the uses of the land when purchased. In *Papillon v. Voice* there was a direction to the trustees to convey and settle, but there was no such direction in the principal case.

It is evident that in the last case the Lord Keeper considered the lands, when bought, as in the very same predicament, as if they had been lands originally vested in the trustees by the will; and thereby limited to the trusts referred to, without any prescribed medium of conveyance by them. And under that view of the case, he held that *P.* was intitled to an estate tail in the lands to be purchased; agreeable to the apparent principles of his decision in *Wright v. Pearson*.

There is a still later authority, of the first respectability, in support of the analogy between the construction of *trusts* and *legal* estates, in respect to the rule under consideration.

Jones v.
Morgan, 1
Brown Cas.
Canç. 206.

sideration. It was a case where a testator devised his estate to trustees, to raise money (in aid of his personal estates) for payment of debts; and after payment of debts, and after limitations to the use of his youngest son and the heirs male of his body, in the same manner as those following to his eldest son *W.* *to the use of his son W. for and during his natural life, without impeachment of waste, and from and after his decease to the use and behoof of the heirs male of the body of his said son lawfully begotten, severally, respectively, and IN REMAINDER, the one after the other, as they and every of them should be in seniority of age and priority of birth, with remainder over.* Powers were given to the testator's sons, whilst in possession, of leasing, making jointures for wives, and raising portions for younger children. Upon a claim by the personal representative of *W.* to the amount of an incumbrance which *W.* had paid off in exoneration of the estate; one point insisted upon, in answer to it, was, that *W.* was tenant in tail; and therefore his paying off the incumbrance was an exoneration of the estate. Against which it was contended; that this was the case of a trust; that the estate was expressly to *W.* *for life, without impeachment of waste;* and the words *in remainder*, in the limitation to the heirs male, was as strong, as if the testator

had said *by purchase*; and that the powers were concurrent evidence of the testator's intention to give *W.* only an estate for life. And the case of *Bagshaw v. Spencer* was strongly urged in support of that construction.

Lord Chancellor *Thurlow* said, if the question were new, and he had only to give his ideas of equity, in analogy to the rules of law, he should have considered the case the same as if it had been at law. He took the rule in *Shelley's* case never to have been shaken at all. But That before him was a question *in equity*; and the difficulty arose from the case of *Bagshaw v. Spencer*. He could not say he was *satisfied* with the *reasons of that determination*. He could not distinguish the case of *Wright v. Pearson* from the principal one. He knew Lord *Hardwicke* did frequently state the circumstance of there being *trustees to preserve contingent remainders*, as varying *Bagshaw v. Spencer* from other cases before him. He wished he had stated his reasons. Lord *Thurlow* could not see how it varied the case, except by shewing the intent of the testator to give an estate for life; other words of the same import must have the same construction. At law he should not think the words *severally, successively, and in remainder*, would make such difference. In construing
informal

Supra, 92.

informal words, the argument *took up the word* REMAINDER, and gave it a *technical* sense, which it refused to the words *heirs male*. That in all cases where the limitation was of an estate of freehold to a man, and afterwards to the heirs of his body (whether general or special) so *as* to give it to the *heirs* as a *denomination or class*, the heirs should be in by *descent*, and not by *purchase*. That in *Garth v. Baldwin* Lord Hardwicke put it, that his opinion in *Bagshaw v. Spencer* turned upon there being trustees to preserve contingent remainders. That one could not but be rather astonished, at hearing grave and learned men reason, that testators were acquainted with the rules and effects of contingent remainders, and yet knew not how to give a contingent remainder in common form. That in the principal case, if it was not a legal estate, it was because the first use (for the payment of debts) might absorb the whole estate. That in *Bagshaw v. Spencer* the Master of the Rolls took it clearly to be an *estate tail*. That in *Garth v. Baldwin* Lord Hardwicke's decree in *Bagshaw v. Spencer* being pressed upon him, he *attempted* a distinction; and said that the construction must be according to the constructions of legal estates, unless there was a plain intent to the contrary; such declaration as Lord Hobart expressed himself in the case of a will, would

would over-rule the legal construction. That in *Garth v. Baldwin*, the exception taken was *such a one* as explained the rule; and the construction there *restored the law*, that trusts were to be construed in the same manner as legal estates. And upon the whole, Lord *Thurlow* thought the same rule must apply in the principal case, as at law.

It is true, indeed, that the Chancellor's decision did not depend merely on the point of the devisee's taking an *estate tail*; as his Lordship thought, that if only tenant for life, he meant to exonerate the estate. But the complexion of the Chancellor's arguments, and the inferences from them, upon the point, for which the case is here adduced, leave little room to doubt that his decision would have been the same if it had turned on that only.

It seems difficult, after the last cited cases, to speak of the authority of *Bagshaw v. Spencer*, otherwise than as an anomalous case, applicable (if at all) only to its *fac simile in specie et terminis*.

The view which I have taken of the several decisions in equity above noticed, upon questions relative to the application of the rule in *Skelley's case*, cannot, I conceive, have failed

failed to affect us with some impression, of the strong line of distinction afforded by them, between two species of trusts, respectively termed *executory* and *executed*; as relative to the latitude of the construction or execution of the trust, in a manner different from the legal import of the words of the will. Most of the cases preceding, as well as following that of *Bagshaw v. Spencer*, have laid down and proceeded on such a distinction; and some of them, I think, have furnished us with a sufficient explanation of it. In *Bagshaw v. Spencer*, Lord *Hardwicke* set himself against it, in a manner that appears the more extraordinary, when we recollect his own *resort* to it in some former cases. That his treatment of the distinction, in order to clear his way to the decree in *Bagshaw v. Spencer*, was singular, appears beyond dispute, when contrasted with the sentiments of the Master of the Rolls, who actually referred to and relied on it in his decree in the very same case. And as later cases have re-assumed it, I think it worth while to re-trace the lineaments of the distinction, as expressly avowed, or tacitly pursued in the several cases wherein it was applicable. For if it should be found, that the distinction is in its nature ascertainable with sufficient precision; and that it has in fact prevailed through a great majority of the most important and solemn decisions; it remains

remains to be submitted to the wisdom of our courts, how far a professed adherence to the same distinction may deserve their attention; as tending to the establishment of a system or uniformity of doctrine, that may keep questions of this nature within some probable limits of construction.

It may be sufficient to commence our review of the nature and application of the distinction I am speaking of, with the case of *Earl of Stamford v. Sir John Hobart*; in which we find a solemn decision professedly grounded on the trust being *executory*, as well as an explanation of what was meant by *that description*. The Chancellor introduced his decree, by declaring that in matters *executory*, as in the case of *articles*, or a *will directing a conveyance &c.* the court would order the conveyance to be made as would best answer the intent. And the argument in support of that decree in the House of Lords, refers to the practice of courts of equity upon *executory articles*, in prospect of *future conveyances* to be *afterwards made*; and the presumed ground for extending it to the case of a will, *where* the same was only *executory* by a *conveyance to be made*. Hence we understand, that by *executory trusts* in wills, were meant those, where, as in articles, the completion of them is *referred to a conveyance*
or

or settlement, *directed to be made* by the testator, in contradistinction to those trusts, in which no such *executory medium* is referred to.

In *Leonard v. Earl of Suffex*, the first reason expressed for the decree was, because the estate was not *executed*, but *executory*. And the very limits of the distinction afforded us in the *Earl of Stamford v. Sir John Hobart*, were recognized in *Papillon v. Voice*, in the arguments adduced by the counsel, and assented to by the court, to shew that there was no necessity that the *conveyance directed by a will*, should be in the words made use of in the will; and the decree proceeded on the *executory* nature of the trust. Lord Talbot explicitly alluded to the same features of the distinction, in *Lord Glenorchy v. Bosville*; when he said, in cases of *trusts executed*, or immediate devises, the construction ought to be the same; for *there* the testator did not suppose any other conveyance would be made. But in *executory* trusts he left something to be done; the trusts to be executed in a more careful and more accurate manner.

In *Roberts v. Dixwell*, Lord Hardwicke said, the latter part of the trust was *merely executory*, to be carried into execution after the performance of the antecedent trusts; the whole *direction* therefore fell upon the court, and

and they were to direct *how* the parties *were* to convey. That court, he said, had taken much greater liberties in the construction of *executory trusts*, than where the trusts were *actually executed*; and referred to the cases of *Earl of Stamford v. Sir John Hobart*, *Papillon v. Voice*, and *Lord Glenorchy v. Bosville*; and he directed a conveyance to the sons successively in tail, it being *not* a *trust executed*, but *executory*, and to be carried into execution by that court. As Lord *Hardwicke* did not expressly draw the line between trusts *executed* and *executory*, it may possibly be suggested, that he ranked all *trusts* under the description of *executory*, and meant by trusts executed *legal estates*, or *uses executed*. Upon which we are to remember, that he in fact negatived any such conclusion, when he said, "to be sure where an estate has been granted or given by will to *A.* for life, and to the heirs of the body of *A.* such a devise has been, by the *common law*, united so in the first person, as to convey him an estate tail: that the *same construction* too had prevailed in *respect* to *trust estates*; but in the case before him, he said, there were *all sorts of trusts &c.* but the latter part of the *trust* was *merely executory*." Now here, he expressly distinguished between *legal estates* and *trusts* in general, and between several sorts of trusts; and therefore in terming one sort of trust, *executory*, he recog-

nized a distinction, between that and other *trusts*, that were not so; and clearly pointed out the nature of that distinction, by saying the *trust in question* was *merely executory*, and to be *carried into execution*; and referring to the very cases, in which the line of distinction between trusts *executory* and *executed*, had been explicitly and clearly drawn.

Baskerville
v. Baskerville, 2 Atk.
281.

So in another case, where money was directed by will to be laid out in lands, to be conveyed to the use of one for life, remainder to his first and other sons successively in tail male; Lord *Hardwicke* supplied a *trust* estate for preserving contingent remainders. He said it was the bequest of a sum of money to be laid out in land, and therefore *merely executory*; and the question was, whether the court should carry it into execution, so as to make it nugatory and of no effect; or so as to answer the clear intent of the testator, which was to have a *strict settlement*?

Supra, p. 84.
Vide 2 Atk.
574.

In the case of *Bagshaw v. Spencer*, the Master of the Rolls said, that in *Lord Glenorchy v. Bosville*, and *Roberts v. Dixwell*, the lands were devised to trustees *to convey*, which made it *executory*, and altogether different from the principal case, which, he said, was the case of an immediate devise, and not of a devise of lands *to be settled*. That as to the consideration,

consideration, whether the devise was *executory* or not, though all trusts were *in some sort* executory, yet it was *well understood* what an *executory trust* was. That as to the debts it *could not be executory*, because the trustees could sell no more than was sufficient to pay the debts; nor was there any provision for *laying out* the surplus money. And after the debts and legacies paid, the devise was immediate. Here we find the distinction between trusts *immediately declared* of the lands, and trusts directed to be *raised* under a future conveyance or settlement, held by the Master of the Rolls, as the *well understood distinction* between trusts *executed* and *executory*.

Lord *Hardwicke*, however, in *Bagshaw v. Spencer*, denied the distinction; by saying that all trusts were in *notion of law* executory, and were to be *executed* in that court. That testators were generally presumed to know, that some further conveyance of the estates devised to trustees, must be made: for they could not presume that the estates should always remain in their trustees; but must be by them conveyed to other persons, according to the tenor of the will.

Supra, p. 84.
Vide 2 Atk.
583.

This doctrine from Lord *Hardwicke*, after his use of the distinction in the two last noticed cases, must have appeared new. And

though the first part of his position is true, that all trusts are in *notion of law* executory, it did not follow, that *courts of equity* might not distinguish *trusts themselves* into *executed* and *executory*. The Master of the Rolls, as we have seen, had before observed, though all trusts were in *some sort executory*, yet it was *well understood*, what an *executory* trust was; and we have seen the same distinction before resorted to by Lord *Hardwicke* himself. And as to his position, that testators are generally *presumed to know*, that some further conveyance of the estates devised to trustees is to be made; it amounts to an admission, that testators must generally be presumed to know, the *technical distinction* betwixt *legal* and *equitable* estates; between a devise which executes the use in the trustees, and one that executes it in the *cestuis que* trust; between a devise to the *use of A. in trust for B.*, and a devise to *A. in trust for B.* But under such an admission, every pretence for deviating an *iota* from the *legal import* of the words used by the testator, in the limitation to the *heirs of the body &c.* falls to the ground. The same *legal skill*, that apprized the testator of the distinction between *uses* and *mere trusts*, between *legal* and *equitable* interests; and taught him to look for a conveyance from the trustees, in the one case more than in the other; could not have left him ignorant of the

the legal import of the *words of limitation* used by him; and if so, we must suppose he *intended* what, under such skill, he technically expressed. Such, I conceive, would be the inference from the presumption advanced by Lord *Hardwicke*, in support of his rejection of that distinction; which, though acknowledged by him in former cases, he appears so very solicitous to get rid of in that of *Bagshaw v. Spencer*. How much better founded was Lord *Talbot's* reason for the distinction itself, laid down in the case of *Lord Glenorchy v. Bosville*; that in cases of *trusts executed*, the testator did *not suppose* any other conveyance would be made; but in *executory trusts* he left somewhat *to be done*; the *trusts to be executed* in a more careful and more accurate manner. Supra, 83.

It seems as natural for a testator, however destitute of legal knowledge, to *suppose*, when he devises or *directs* lands *to be conveyed* by trustees to certain uses; that a conveyance by them will be requisite to effectuate those uses or trusts; as for him *not to entertain the supposition* of any such conveyance, where he devises the lands to trustees, immediately to the use of or in trust for certain persons, without any further direction. The latter he may, if not instructed to the contrary, well suppose to be a *formal mode* of intitling the devisees

immediately under the *disposition of his own will* for their benefit. The other he cannot view in the same light, but must *suppose*, because he *expressly directs*, a *further conveyance* to be made pursuant to the will. In the ^{one} ~~first~~, therefore, he may be considered as thinking the limitations definitive and final, as to the interests expressed by him; whilst in the other, he may be understood to leave them to be *perfected*, by the *conveyance directed* by him; and which, it may fairly be supposed, he intended should avoid or correct any relative inconsistencies, or technical obstacles, arising from impropriety of expression, to the apparent general scope of the settlement or conveyance so *directed by him*. In short, Lord Hardwicke found the distinction established; he had actually argued upon and availed himself of it, upon former occasions; it stood in his way in *Bagshaw v. Spencer*; and to get rid of it, he attempted to reduce *all trusts* to the description of *executory trusts*; and equally distinguishable from legal estates, in respect to the constructive controul of courts of equity. And this it appears he attempted, by advancing a position, which, if admitted, would operate to exclude all pretensions for any departure from the express words of the will; because it in effect asserts the presumption, of no small degree of legal and equitable information, in testators in general;

opinion, that in the case of *imperfect trusts* only, that court could make a different construction from a legal limitation; that in the principal case there was no *reference to the trustees &c.* Nothing was *left to them to be done*, but to buy the land; the testator had *declared the uses of the land* when purchased; and he did not believe the testator intended the trustees should *make a conveyance* of it. That in "*Papillon v. Voice*," there was a direction to the trustees *to convey and settle*; but there was *no direction* in the principal case. The true guide, he said, was, that where the assistance of the trustees, which was ultimately the assistance of the court, was prayed in aid to *complete a limitation*, in that case the limitation in the will, *not being complete*, it was a sufficient declaration of the testator's intention, that the court should model the limitations; but where the trusts and limitations were *expressly declared*, the court had no authority to make them different from what they would be at law. It is obvious that the Lord Keeper, in this case, carried the distinction, upon the circumstance of a *direction by the testator* of a *future conveyance by the trustees*, to its utmost limits.

And we may also remark, that Lord Chancellor *Thurlow* seems to have alluded to the
same

same distinction, between trusts *executed* and *executory*, in the case of *Jones v. Morgan*. Supra.

When speaking of the case of Lord Glenorchy and Bosville, he called it an *executory case*; that in the principal case, after payment of debts, the testator did not *mean* to leave any thing *executory*. That if it was not a *legal estate*, it was only not so because the first use (for payment of debts) might absorb the whole estate. That if trusts were to be construed as legal estates, there could not be a more proper case to apply the rule than that was; as there could be nothing *so near* to a legal estate, as the principal case was.

Vide *Brown*
Caf. Canc.
221—2—3.

Thus appears to rest the distinction between trusts *executed* and *executory*; or those where the trusts are *directly and wholly declared* by the testator, to *attach* on the lands *immediately under the will* itself; and those which are only *directory*, or *prescribe* the intended limitations of some future conveyance or settlement, directed by the will to be made for the effectuating them; a distinction which has run, with a pretty strong current, through the several cases affording subject matter for its application. The cases of *Allgood* and *Witbers*, and *Bagshaw* and *Spencer*, seem to be the only instances, in the above catalogue of trusts *not executory*, in which it may be questioned, whether the construction agreed with

Supra, p. 83,
84.

with what it would have been upon similar limitations at common law. The former of those had some ingredients of a very peculiar cast, to influence the decision. The latter was of a complexion so nearly allied to some subsequent cases, as to call forth the observation of Lord Keeper *Henley*, in *Wright v. Pearson*, that Lord *Hardwicke*, upon the circumstances in *Bagshaw v. Spencer*, construed it to be only an estate for life, *contrary to the former determinations*; as well as that of Lord *Thurlow* in *Morgan v. Jones*, that he did not see how the cases of *Bagshaw v. Spencer* and *Wright v. Pearson*, could stand together. The analogy between the construction of legal estates and trusts executed, it must be confessed, prevailed to a very strong degree in *Wright v. Pearson* and *Austen v. Taylor*. It had, as we have seen, been frequently affirmed before; and Lord *Talbot*, in the case of Lord *Glenorchy v. Bosville*, speaking of *Bale v. Coleman*, says, the execution was to be of the *same estate* as he had in the trust. An observation of no trivial import; and which seems equally applicable to all cases of trusts executed; that is, where the estates are *finally* limited by the will itself, without any kind of reference to any further execution of them by a conveyance directed by that will. For in such cases, any occasional conveyance, that may at any time be required of the legal estate from the trustees, may well be

be deemed a matter of *form only*; and not otherwise requisite, than for the mere purpose of investing the *subsisting trusts*, whatever they may be, with their cognate and commensurate *legal cloathings*; whilst limitations, whose effect is referred, *by the will itself*, to a conveyance directed to be made for their establishment; may reasonably be considered as left to some *degree of modification*, by that *supplemental* part of the will, *viz. the conveyance* to which their *completion is referred*. In the one case, the limitations may be deemed to receive their intended shape from the *words* of the will itself; when in the other case, they are in a state of *embryo*, till delivered by the *directed* conveyance, which is intended to model and give them their ultimate form. The decided cases seem to go a great length, in a distinction of this nature.

But to support the argument, that courts of law should give into the same latitude and freedom of construction, as the court of Chancery, in respect to the limitation I am treating of; it has been urged, as a strange kind of inconsistency, that the same limitation should bear different constructions on the different sides of *Westminster-Hall*: that a man should be tenant in tail on one side of the hall, by the very same limitation, which, if he steps across to the other side, will make him only tenant
for

for life. The objection sounds specious enough; but if we look to any thing further than words, it loses its force.

(94) The argument upon the construction varying with the court, seems not founded; it is the different subject-matter of the limitation which occasions the alteration in the construction of it, and has occasioned the same difference of construction even in the very same court. The courts of law and the courts of equity, have hitherto agreed in their construction of the limitation in question, whenever it respected a *legal* estate: the courts of equity distinguish between a *legal* estate and a *trust executory*, (at least) and vary the construction accordingly. If the courts of law had been concerned with trusts, may it not be supposed they would have made the same distinction? Where is the inconsistency in allowing different operations to the same limitation, when applied to objects of such different natures and descriptions, as *legal estates* and *executory trusts* clearly are?

It is to be admitted, that the general rules of property, respecting *legal* and *trust* estates are the same; but the particular modes of construing the limitations of them may vary. The conformity between the rules of property in *legal* and *trust* estates, respects the
allowed

allowed measure of the limitations, and not the *mere construction* of them, as Lord Hardwicke observed in the case of *Bagshaw and Spencer* before cited. The limitations of *trust-estates*, of whatever description, cannot be carried to a greater length, or go further towards a perpetuity, than the limitations of *legal estates*; but it does not follow, that some of the first description may not be expounded more freely, with more regard to the evident intent, and with less adherence to the *legal* import of technical expressions, than the latter. Nay, a distinction of that sort naturally arises, from the different qualities of a *trust* and *legal* estate, as before explained.

When a court of law, in certain instances, construes the limitation of a *legal estate* differently, from what the court of Chancery would construe the same limitation, if applied to some *trust-estates*; it does exactly what the court of Chancery itself has used to do in similar cases.

(95)

Thus where, in a case before cited, *A.* devised a sum of money to trustees *in trust*, to be laid out in lands, and to be settled on *B.* for life, without impeachment of waste, remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.* re-

Papillon v.
Voice, *supra*,
p. 83. 2 P.
W. 471.

B. remainder over, with power to B. to make a jointure; and by the same will devised lands to B. *for his life, without impeachment of waste, remainder to trustees, and their heirs during the life of B. to support contingent remainders, remainder to the heirs of the body of B. remainder over.* Though it was decreed at the Rolls, that an estate for life only passed to B. with remainder to the heirs of his body *by purchase*, as well in the lands devised, as in those directed to be purchased; yet upon an appeal from this decree, Lord Chancellor King declared, as to that part of the case where lands were devised to B. for life, *though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B.* this last remainder was within the general rule; and must operate as words of limitation, and consequently create a *vested estate-tail* in B.; and that the breaking into this rule would occasion the utmost uncertainty. But as to the other point, he declared the court had a power over the money directed by the will to be invested in land; and that the *diversity was* where the will passed the *legal estate*, and where it was only *executory*, and the party must come to the court in order to have the benefit of the will; that in the latter case, the intention should take place, and not the rules of law; so that as to the lands *to be purchased,*

purchased, they should be limited to *B.* for life, with power &c. remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail-male successively, remainder over.

Here we observe, that in the *very same* case in the *very same* court, the *same limitation* received two *different* constructions when applied to a *legal* and to an *executory trust-estate*. Nor is there any thing extraordinary in giving *different* constructions to the *same words* in the *same will*, in regard of their application to objects of a different nature; as may be seen in 1 *P. W.* 667. in the case of *Forth and Chapman*. 2 *P. W.* 140. in the case of *Harris and Bishop of Lincoln*, 3 *Atk.* 288. in the case of *Sheffield v. Lord Orrery*, and in *Earl of Stafford v. Buckley*, 2 *Vez.* 180.

(97)

It is observed, indeed, in a note at the end of *P. Williams's* report of the case of *Papillon and Voice*, that though the above was Lord Chancellor *King's* opinion, yet the question as to the land devised was given up; the plaintiff having brought a supplemental bill, whereby it appeared that by his father's marriage-articles he was intitled to an estate-tail. And Lord *Hardwicke* in the case of *Bagshaw and Spencer* says, that the opinion given by Lord Chancellor *King*, in the case of *Papillon and Voice*, was a sort of extrajudicial opinion; that,

Vide 2 *P. W.*
478.

Vide infra,
P. 104.

Vide 2 Atk.
581. 1 Vez.
149.

that, taking time to form his decree, he (Lord C. King) said, he had looked into the case of *Lisle and Grey*, and seemed to be less clear as to the *legal* estate than before; but as the supplemental bill had brought a new right, he took care to express that the direction to reverse that part of the decree &c. was expressly founded upon that supplemental bill; which looked as if he wanted to avoid the point.

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Now I must confess, that after the supplemental bill had disclosed a *new right* paramount to, and which left no room for any right under the will, I don't see how the direction for reversing the decree at the Rolls, could be expressed *otherwise*, than as founded on such supplemental bill; *i. e.* on the *new right* thereby disclosed; the other being entirely superseded and removed by it; nor, therefore, am I able to discover how the expressing the decree in *that manner* (there being no foundation for expressing it in *any other*) looked like an *inclination* to avoid the other point; or indeed how it was in his power not to avoid that other point; seeing it was annihilated by the new disclosed right under the settlement. By the report in *P. Williams*, Lord Chancellor King seemed to be clear in his opinion as to that first point, *whilst it existed*, and before the supplemental bill was brought,

brought, expressed his intention to reverse the decree; as indeed was observed by the Master of the Rolls in delivering his opinion in the case of *Bagshaw* and *Spencer*; who also observed, that there was another report of the case, where it was said at the end of it, that in the case of *Williams* and *Brown*, Lord *King* had declared he would reverse the decree. And it seems Lord *Hardwicke* himself in the case of *Bagshaw* and *Spencer*, said, that since the case of *Coulson* and *Coulson*, he would urge the case of *Papillon* and *Voice* no further than as an authority, that a *trust* estate by will so penned, ought to receive such construction as he was then speaking of, and the court to direct a conveyance accordingly; in which the court was clearly warranted by former cases, as in *Leonard v. Earl of Suffolk*; upon which case he only observed, that if the devise had been of a *legal* estate, with such clause *not to alien*, the sons must have been *tenants in tail*, and there would be no operation from that clause, and yet upon a *trust* in equity, it would turn them into tenants *for life*. The same distinction appears to have been taken in the same court, in other cases which I shall cite hereafter.

Vide 2 Atk.
576.

Vide 1 Vez.
149.

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Supra p. 82.
Infra 113.

In truth, therefore, it appears that the argument drawn from the inconsistency of admitting different determinations, upon the

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same

same limitation in different courts, rather makes against that latitude of construction in the courts of law, which it is intended to support. For if the courts of law should construe the limitation of a *legal estate*, in the same manner as a court of equity does the limitations in articles or in executory trusts, the construction of courts of law, and courts of equity, would often differ in respect to the same limitations of a *legal estate*; because courts of equity often construe the limitations of legal estates, differently, from the same limitations in articles and executory trusts. Then indeed would the inconsistency *talked of*, really *exist*, as the *same* limitations of the very *same* kind of estate, would bear *different* constructions in *different* courts.

(100)

But what reason can there be, for contending, that because the court of Chancery is not bounden by a rule of construction, which in its origin and principle had no relation to the objects of that court's jurisdiction; therefore a court of law shall cease to pay the accustomed attention to it, in their decisions on cases of a very different kind, and which were the original, and have ever since continued, the immediate objects of that rule. The authority which could convert a *court of law* into a *court of equity* in one instance, and abolish all distinction between *legal estates* and

and *trusts*; might proceed to tell us, there is no sound distinction at all between the supposed objects, or principles or rules of the jurisdiction of the one court, and those of the other: and that a court of *law* and court of *equity* in this kingdom differ but in *name*.

Some instances there are, even in cases at common law, wherein the subsequent limitation to the *heirs of the body* have been so qualified and corrected by other additional words, as to amount to words of *purchase*, and not of *limitation*; but I am not apprized of any (101)
 case anterior to that of *Perrin and Blake* in *Infra*, p. 110. the *K. B.* 1769; where a perfect limitation to the *heirs, or heirs of the body* (in the plural number), unqualified by any concomitant limitation to *sons, daughters, or children*, (by reference to which the general force of the word *heirs* &c. might be restrained) preceded by a limitation of the *legal estate* for *life* to the ancestor, in the *same deed* or *will*, has been held not to attach in that ancestor, but go to the heir by purchase. Many cases it is true have been cited to prove such a determination, to have been no uncommon thing; but, with submission, I apprehend it no difficult matter to shew, that no one of the cases so cited comes up to the position it is intended to support.

Upon examining the authorities adduced in support of the judgment in the case of *Perrin and Blake*; it appears, that some of them are cases of *trust-estates*, therefore serve only to prove what is not denied; in others, the word *heirs* is not made use of, but the limitation is by words which have not the same established legal import and extent, such as the word *issue* or *sons*, or other words of such less technical force; in others again, there is no limitation of the *legal freehold* to the ancestor, or the heir is expressly confined to a life-estate; and I believe there is not one of them in which the ancestor takes an estate for life, and the inheritance is not denied to the heir, and the words *heirs*, or *heirs of the body* (in the plural number) are used, wherein those words are not restrained or qualified, either by reference to other limitations, or else by additional words, conjoined with them.

(102)

Cheek v.
Day, Moor
 593. 2 Roll.
 Abr. 417.
 (G) pl. 7.
 Cro. Eliz.
 313. Ow.
 148. (cited
 Ld. Raym.
 205. & Fitz-
 Gib. 24.)

Thus in the case of *Cheek v. Day*, or *Clarke v. Day*, *A.* devised lands to her daughter for life, and if she should marry after the death of the testatrix, and have any heirs lawfully begotten, then she willed that her daughter's heir should have the lands after her daughter's death, and the *heirs of such heir*. It appears by the various reports of this case, that the judges were much divided in regard to it. But *Moor* says it was adjudged an estate for life only in the daughter, though no judgment

judgment is entered upon the roll (as *Fitz-Gibbons* reports). Now here we observe the limitation was to the *heir* (lawfully begotten) in the *singular* number, and words of limitation were grafted thereon; and indeed according to the above state of the case, which is that delivered by *Fitz-Gibbons* as taken from the roll, the limitation grafted on the word *heir*, was in fee, which carries the case still further from the point; for the limitation being to the *heir lawfully begotten* could not give the *fee-simple* to the ancestor, an *estate-tail* in the ancestor could not have answered the superadded words of limitation *in fee* to the heir.—This use of the word *heir*, &c. in the *singular* number with words of inheritance in fee grafted thereon, reduced the import of the word *heir*, to a designation of such issue of the daughter, as should be her heir, and made the person answering that description the root of a new inheritance, the stock of a new descent; as observed by Judge *Blackstone* in his argument above referred to.

Vide of this Case.
Amb. 459.

Vide Hargr. Law Tracts 506.

So in *Archer's* case, the limitation was to *A.* for life, and after to the next *heir-male* of *A.* and to the *heirs-male* of the body of such next *heir male*: *and therefore upon the same principle the devise to the heir was a remainder to him by purchase; because the word *heir* was in the singular number preceded and distinguished by the word *next*, and fol-

Archer's case,
1 Rep. 60.

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1 Roll. Abr.
837.
pl. 13.
1 Ventr. 231.

lowed by the words of limitation grafted on it.—The case in *Roll* cited by Lord *Hale* in the case of *King* and *Melling*, was a limitation to one for life *et non aliter*, and after his death to the *sons* of his body; which was very different from a limitation to the *heirs* of his body; the words *et non aliter* imposed a restriction against his taking otherwise than for life; and *sons* did not in expression extend to grandsons or remoter issue, and it applied immediately to all sons, without preference of the eldest, as in a descent in tail; whereas a devise to the *heirs of the body* comprehends the remotest issue, and takes the eldest son previous to and in preference of the younger.

Palm. 359.
Walker v.
Snow.

Again, where *A.* conveyed by fine to the use of himself for life, remainder to the use of his *first son* and of the *heirs-male of his body*, with like limitations respectively, to his second, third, fourth, fifth, and sixth sons, remainder to the right heir of *A.* to be begotten after the sixth son, and of his *heirs-male*; it was held the remainder was contingent, because first limited distinctly to particular sons; besides this remainder expressly excluded the first six sons, and therefore it essentially differed from a limitation to the *heirs of the body*, which would have descended to the eldest son first: and it is further observable in this case, that the limitation was not to the *heirs* in the plural, but to the right heir

heir in the singular number, with words of limitation superadded, as in *Archer's case* 1 Co. 66.

So where *A.* covenanted to stand seised to the use of himself for life, and after his decease to the use of *E.* his son for life, and after his decease to the use of the first son of the body of *E.* and the heirs-male of the body of such first son; and for default of such issue, to the use of the second son of the body of *E.* and the heirs-male of the body of such second son, and for default of such issue, to the use of the third son of the body of *E.* and the heirs-male of such third son, and for default of such issue, to the use of the fourth son of the body of *E.* and the heirs-male of the body of such fourth son, *and so severally and respectively to every of the heirs-male of the body of the said E. and the heirs-males of the bodies of such heirs-males according to their ages and seniorities,* and for default of such issue, remainder to *W.* &c. And *A.* also covenanted that if it should happen that *E.* should die without issue-male of his body lawfully begotten; that *A.* would then stand seised of the lands to the use &c. to raise portions for the daughters of the said *E.* &c.—*E.* after the death of *A.* suffered a common recovery of the lands, and afterwards died without issue; and after his decease *W.* the remainder-man brought his

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2 Lev. 223.
Raym. 278.
Lisle v. Gray.

(105)

ejectment in *B. R.* for the lands. The question was, whether *E.* took an estate-tail, or only an estate for life under the limitation above stated. It was contended for the plaintiff *W.* that the words *and the heirs-male of the bodies of such heirs male* made the heirs-male to take by *purchase*, otherwise those superadded words were useless; that the words *and so severally and respectively to every of the heirs-male &c.* were words of relation, and signified *so* as the heirs-male, *viz.* sons took before; that translating the word *so* into Latin, it would be *eodem modo*, as the four first sons; and that the proviso for charging the land with portions for daughters of *E.* if he should die without issue was unnecessary, if *E.* was to take an estate-tail, by which he might do it without such a proviso. The court held the words *and so &c.* to be words of *relation*, and gave judgment for the plaintiff. Upon which a writ of error was brought in the Exchequer-chamber, where it seems the judgment was affirmed, as is observed by Judge *Tracey*, 1 *P. W.* 90. who, it appears, had searched the record, the reports differing in that matter.

It is evident that in both the cases of *Walker v. Snow*, and *Lisle v. Gray*, the general import of the words *heir or heirs &c.* was qualified, by reference to the *preceding distinct and particular*

particular limitations to the first and certain other sons in tail, as well as by words of limitation grafted on them.

In a case where *A.* devised land to *B.* for life without impeachment of waste and in case he should have any *issue-male*, then to such *issue-male and his heirs for ever*; upon a question whether this subsequent limitation to the *issue-male* of *B.* made *B.* tenant in tail or not, it was held that it did not, but was a contingent fee to his *issue-male*. Now this was not only a limitation to the *issue-male* instead of *heirs* &c. but that limitation was even accompanied by superadded words of limitation *in fee* grafted on the words *issue-male*; which circumstances carry this case quite out of the rule I am treating of.

Luddington
v. Kime.
1 Salk. 224.
Lord Raym.
203.

So the case of *Backhouse v. Wells* was a limitation to one for life *only*, and after his decease to the *issue-male of his body*, and to the *heirs-male of the bodies of such issue*. Here besides the restrictive word *only*, the limitation was to *issue-male* with words of limitation grafted thereon. And it is to be remembered that the word *issue* itself, even unattended with any engrafted words of limitation is often a word of *purchase*, where the word *heirs* (or even *heir* in the singular number) is not. And upon the case of *Backhouse and Wells*,

1 Eq. Abr.
184. pl. 27.
Backhouse v.
Wells.

Vide infra.
p. 139, 140.
2 Stra. 731.

2 Strange.
731.
2 Ld. Raym.
1440.

Wells, Lord Chancellor *Parker* observed, that if the words *beirs-male* had been used instead of *issue-male*, the operation of the law would have been too strong for the intention of the testator.

White v.
Collins.
Com. Rep.
289.

And where a testator devised lands to his son *F.* to enjoy the rents and profits thereof during the *term of his natural life*, with power to make a jointure of all or part, and after his death and jointure, if any be made, to the *heir-male of his body lawfully begotten*, during the *term of his natural life*, and for want of *such heir-male*, he gave the same lands to another son, &c. It was adjudged that *F.* took only an estate for life; for though it was agreed, that the limitation to him, to enjoy and take the profits *during his life*, and after his decease to the *heir-male of his body*, even in the *singular number*, would make an estate tail where nothing appeared which explained the intent to the contrary; yet, there the limitation to the *heir-male* shewed the testator's intent that *such heir-male* should have it *for life only*; and the devise over for want of *such heir-male*, did not import that the ulterior devisee should not have it *till F. died without heir-male generally*, but, for want of *such heir-male*, who was to have it for life.—In this case, as Judge *Blackstone* observed, in his argument before referred to; common sense would

1 Hargr.
Tracts p.
505.

would tell us, that when the heir-male was *not to have the inheritance*, he could not take as heir by descent.

Again, where a devise was to *B.* and his heirs lawfully to be begotten, *that is to say, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said B. and the heirs of the body of such first, second, third, and every other son and sons successively*, lawfully issuing as they should be in seniority of age and priority of birth, the eldest always, and the heirs of his body, to be preferred before the youngest and the heirs of his body, remainder over &c. It was adjudged that *B.* took but an estate for life; for that the subsequent clause was not *contrary* to the preceding general limitation to *B.*'s heirs lawfully to be begotten, but explanatory of *what heirs &c.* were meant.

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Lawe v. Davies.
2 Ld. Raym.
1561.

In the more modern case of *Doe* and *Laming*, which was a devise of gavelkind lands, to *A.* and the *heirs of her body* lawfully begotten or to be begotten, *as well females as males*, and to their *heirs and assigns* for ever, to be divided equally, share and share alike, as *tenants in common*, and not as jointenants; it was held that the word *heirs of her body* did not operate as words of limitation, nor consequently create an estate-tail in *A.* For here these

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Doe v. Laming.
2 Barr. 1100.
1 Black. Rep. 265. And vide 3 Darnl. and East Rep. a Note on this Case.

(108)

these words did not stand independent and unqualified, but were corrected and explained, very expressly, by the words which followed and were coupled with them; the words *as well females as males*, annexed to the words *heirs of the body*, were incompatible with and expressly broke the descent, because gavel-kind lands cannot descend in that manner; and the devise expressly created a tenancy in common, which was impossible by descent, as that must have been in coparcenary; and besides there were words of limitation in fee grafted on the words *heirs of the body*, which could not have been satisfied by an estate-tail in the ancestor.

*See 7. Dury.
H. 1st 531.*

No one of the above cases therefore appears to be analogous to the case of *Perrin v. Blake*; in which the limitation to the heirs of the body after the life estate to the ancestor, was general, unrestrained to any interest less than the inheritance; unfounded as the root of any new inheritance by the annexation of words of new limitation upon it; and entirely uncorrected and unexplained by any kind of preceding or subsequent limitations, to sons, children or objects of a particular designation.

Vide infra.
p. 112.
Allgood v.
Withers,

As to the cases of *Leonard v. Earl of Sussex*, *Allgood v. Withers*, *Bagshaw* and *Spencer*

cer and others above noticed, they were all cases of *trusts*; and therefore, like all other cases of that description, are no ruling authorities for the construction in cases of *legal* estates; as I conceive is sufficiently proved by the several cases I have already cited, to shew the distinction taken by the court of Chancery itself in several instances, between *legal* and *trust*-estates, in regard to the force of that rule which I am now treating of.

cited 2 Burr.
1107.
2 Vez. 237.

(109)

There are also two other classes of cases, which have been resorted to as authorities against the force of the rule now in question; the one consisting of the cases of *Burthett* and *Durdant*, and *Newcomen* and *Barkham*, and *Beaumont* and *Long*, (all noticed in a subsequent part of this essay) and other cases where the ancestor, either took only a *trust*-estate, or else no preceding freehold estate at all; the other consisting of the cases of *Peacock v. Spooner* and *Hodgson v. Bussey*, (which are likewise considered in their proper place in this tract) together with others of the same kind, which relate to the trusts of a term, and have nothing to do with the case of an inheritance. Of all these I shall take no further notice in this place: for the question is not, whether the words *heirs of the body* may not, under certain circumstances, be taken as words of purchase; but,

Vide infra,
P. 144, 145.
146, 147.

Vide infra.
p. 380. 382.

(110)

but, Whether those words, standing clear of any further words of limitation, *perfect, independent* and *unexplained*, and preceded by a limitation of the *legal freehold* to the ancestor in the same will, have ever been construed words of *purchase*? After the observations I have been making, upon the several cases above cited, I conceive no one of those cases, can fairly be urged, in support of an affirmative answer to this question; and as to all those cases wherein the *legal freehold* is not limited to the ancestor, they are entirely foreign to the point.

Was it not reasonable to conclude, that the several cases in which this point had so often been agitated, and so repeatedly determined, had settled the law in regard to it, so, as to enable gentlemen of the profession to form some probable *conjecture* at least, if not *opinion*, respecting the merits of any question of this nature, upon which they might be applied to for their advice? And how much is it to be regretted, that a case should ever arise of so unfortunate a complexion, as to frustrate so desirable a conclusion? The case I am alluding to, is that of *Perrin and Blake*, before the court of K. B. in the year 1769; a case of much discussion, and wherein that court delivered a judgment, to common apprehensions,

prehensions, I believe, not perfectly reconcilable with the stream of former authorities and decisions upon the same point.

The case was this; one *W. Williams* seised in fee of a plantation in *Jamaica*, devised in the following words: "Should my wife be enseint with child, at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000 *l. &c.* and if it be a male, I give and bequeath my estate real and personal equally to be divided between the said infant and my son *John Williams*, when the said infant shall attain the age of twenty-one. *Item*, It is my intent and meaning that none of my children should sell or dispose of my estate for longer time than his life, and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son *John Williams* and the said infant for and during the term of their natural lives, the remainder to my brother-in-law *J. G.* and his heirs, for and during the lives of my son *John Williams* and the said infant, the remainder to the heirs of the body of my said sons *John Williams* and the said infant lawfully begotten or to be begotten, the remainder to my daughters, &c." No other son was born, and the question was, what estate *John Williams* took under this will?

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Perrin v. Blake.
Vide 4 Burr
 2579.
 1 *Black.*
Rep. 672.
Dougl. Rep.
 329. *Note*
 1 *Hargr.*
Law Tracts
 490.

Had

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Had this been the case of an *executory trust*, the court of Chancery might possibly have construed it an estate for life in *J. W.* upon the clause expressing the testator's will, that his sons should not convey a greater interest than for their lives. But as it was the limitation of a *legal* and not a *trust*-estate, the court of Chancery itself (in conformity to its own established distinctions above explained) we may suppose, would have decreed it an estate-tail in *J. W.* Could this be questioned after the cases I have before cited, the several cases, which I am now about to consider, I should think, would remove the doubt.

Leonard v.
Earl of Suffex.
2 Vern. 526.
and vide
supra, p. 82.

Indeed there is one very particular case, which goes directly to this point; I mean that of *Leonard v. The Earl of Suffex*, above cited; where the qualifying clause respecting the settlement directed to be made by the trustees, in their *taking special care in such settlement, that it never be in the power of the testatrix's sons F. or H. to dock the intail of either of the said moieties given them during their or either of their life or lives*, amounted to exactly the same thing as restraining them from conveying a *greater interest* than for their lives: for without docking the intail it was impossible they should convey any greater lawful interest; yet

yet the court of Chancery there held, that if it had been a *legal* instead of a *trust* limitation, the sons would have been *tenants in tail*, notwithstanding that restrictive clause. And Lord Talbot afterwards in the case of Lord Glenorchy, v. Boswell said, that in the case of *Leonard v. The Earl of Suffex*, had it been by act executed, it would have been an estate-tail, and the restraint had been void; but being an *executory trust* the court decreed according to the intent, as it was found expressed in the will. And so likewise Lord Hardwicke, in the later case of *Bagshaw v. Spencer* (before cited) said, that if the case of *Leonard v. Earl of Suffex* had been a *legal estate*, the sons would have been *tenants in tail*; but in equity upon a *trust-estate*, the clause for interposing trustees &c. governed the whole case.

(113)
Cal. temp.
Talbot. 19.

2 Atk. 581.
1 Vezey 149.

The court of King's-Bench however, in the case of *Perrin v. Blake*, treated those distinctions as too refined, and adjudged that *J. Williams* took only an estate for life under the devise in question.

It is true, indeed, that Judge Yates (a very respectable authority) who then filled a seat on that bench, opposed the decision with great depth of learning and solidity of argument.

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And however he stood alone as to that opinion, in the court of King's-bench, it afterwards appeared he was not singular in it; for the majority of the judges in the Exchequer chamber were influenced by the same strict attachment to old established rules of law; and accordingly reversed the judgment of the court of King's-Bench, and thereby restored the venerable uniform train of preceding judgments and opinions upon the same point, to its former authority. As we may therefore consider those authorities still intitled to our attention, I shall endeavour to present the reader with a concise view of them. First observing that in the case of *Perrin v. Blake*, after an appeal to the House of Lords from the judgment of reversal in the Exchequer chamber, which depended a considerable time; the parties at length compromised the dispute, and the plaintiff obtained leave to withdraw his writ of error.

Vid. Dougl.
Rep. 329.
in note
1 Harg.
Tracts. 493.

Paufey v.
Lowdall,
supra p. 44.

In a case above cited of a devise to *B.* for life, remainder to his heir of his body begotten for ever; it was held that the heir took by *descent*, and not by purchase.

Rundall v.
Eely. Cart.
170.

And where a testator devised to his son *I.* certain lands to hold the same to him for life, for and under the use, conditions, and limitations

limitations thereafter limited; and after his decease, then to the use and behoof of the heirs male of his body, and for default of such issue, to his son *W.* and the heirs male of his body, remainders over. *Bridgman* C. J. in delivering the opinion of the Court, on several questions that arose on the case; said, it was *agreed*, that when the testator devised the lands in question to *I. for life*, under the conditions and limitations in the will; and after his decease, to the use of the *heirs male of his body*; though it was limited to him *for life*, it was nevertheless an *estate tail* to him *as well in a will, as in any other conveyance*. That the estates could not stand together. But the estate for life was swallowed up in the tail; and the same rule held in a *devise* as well as in a *deed*.

Here we may also notice a case, where lands were devised to a trustee and his heirs, during the life only of *A.*, upon trust to permit and suffer *A. during his life* to receive the rents and profits, without ^{commitment} ~~impeachment~~ of waste, and after the decease of *A.* then to the *heirs-male of the body of A. now living*, and to such other heirs male, and female, as he should afterward have of his body. It is said, the first question was, whether the estate for life did not execute in *A.* by the

2 Ventr. 311.
Burchett v.
Durdant. in-
fra 144.

(115)*

statute of uses, for if so (says the reporter) he would be seised of an estate-tail. But the court resolved the first limitation was a *trust*, and not an estate executed. Now this was a point the court had no occasion to have entered into, or have given any resolution upon, unless the subsequent limitation might have vested in the ancestor, in the case of a use executed.

Broughton
v. Langley,
2 Ld. Raym.
873.
2 Salk. 679.

(116)

In another case where one devised lands to trustees and their heirs, and declared that the said trustees and their heirs should stand seised of the lands to the uses, intents and purposes therein after mentioned, that is to say, to the intent and purpose to permit and suffer *A.* to receive and take the rents and profits for and during the *term of his life*, and after his decease should stand seised of the lands to the *use of the heirs of the body of A.* remainder over; with a proviso, that the *said trustees and the said A. might make a jointure for his wife*; the question was, whether *A.* had an estate-tail executed or not? And it was adjudged he had. For *Holt C. J.* said, that this would have been a plain trust at common law, and what at common law was a trust of a freehold or an inheritance, is executed by the statute, which mentions the word *trust* as well as *use*. And it was held that a power to make a jointure does
not

not necessarily exclude an estate-tail; because as tenant in tail cannot make a jointure without discontinuing or barring the intail, such power has its use. And *Holt*, in this case, denied the (above-noticed) case of *Burbett* and *Durdant* to be law.

Now, though the power of making a jointure be itself, not allowed a sufficient ground upon which to deny that construction, which gives an estate-tail; yet the circumstances attending that power in the above case, seemed to be very strong against an estate-tail; that power being made to depend upon the *consent* and *concurrence* of the trustees; and they being required to join in the executing it, and of course in the conveyance for that purpose; which seems to have been an evidence of the testator's intention, that the estate should remain in *them*; and consequently that he did not intend *A.* should take any *legal estate* at all, much less an estate-tail. But however, the strength of the general rule prevailed against these arguments of intention.

So where one bequeathed the surplus of his personal estate to be laid out in lands, to be settled on *B.* his nephew for life, and after his decease to the *heirs-male of the body of his said nephew* lawfully to be begotten, and

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Legate v.
Sewell.

1 P. W. 87.

1 Eq. Abr.
394.

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the heirs-male of the body of every such heir-male severally and successively as they should be in priority of birth, every elder and the heirs-male of his body to be preferred to every younger; and for want of such issue to his brother C. for his life, and after his decease to the heirs-male of his body begotten, &c. Upon a question whether B. was to be considered as tenant in tail or only tenant for life, it was insisted, that, if the latter words in this will (and to the heirs-male of the body of every such heir-male, &c.) signified any thing it was no more than what was included in the first, and then *expressio eorum quæ tacite insunt nihil operatur*. Lord Cowper said, there having been a decree already in the case, it must depend on what it was at law; and he was inclined to think the judges there, might take it as an estate-tail; he therefore directed a case to be made for the opinion of the judges of K. B. upon which three judges against one held that it was an estate-tail. Though P. Williams says the parties agreed, yet in (2 Vez. 657.) Lord Hardwicke says, that Lord Cowper thought himself bound to agree with the three judges, and so decreed.

In 1 Eq. Abr. 394. it is, by mistake, said they certified, that he took an estate-tail for life.

2 Ld. Raym. 1437.
Goodright
v. Pullyn.

And where a testator devised lands to N. for his life, and after the decease of the said N. he devised the same unto the heirs males of the body of the said N. lawfully to be begotten, and

and *his heirs* for ever; but if the said *N.* should happen to die without such *heir-male*, then he devised the lands to *B. &c.* The question was, whether *N.* took an estate-tail or for life only by the will? It was contended on one side, that the testator intended him only an estate for life, by his devising it to to him expressly for life; and then here were superadded words, *his heirs for ever* engrafted on the words *heirs males*; that though these words *heirs-males*, were in the plural, yet the subsequent words *his* and *for defaults* of such *heir-male* qualified them, so as to make them signify the same thing as *next heir-male* in *Archer's* case. The judges, however, were all unanimous in opinion, that *N.* took an estate-tail, that the rule was settled so firmly that it was not to be disputed. They held that the subsequent words *his* and if he dies without such *heir-male* were not sufficient to restrain and alter the operation of the words *heirs males*, and so qualify them as to make them a description of the person; and they all agreed that the operation of *plain and clear words*, and a settled rule of law, should not be defeated or broke into by *uncertain or doubtful words*.

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So in a case before the council in 1730, (at which Lord *Raymond* and Lord *C. J. Eyre* were both present) upon an appeal from *Barbadoes*,

R 4

badoes,

Morris v.
Le Gay,
cited 2 Burr.
1102. *Wheat*
2 Atk. 249.
S. Durand.
Inst 35A.

badoes, wherein the testator devised to *L.* for life then to the *heirs of the body of L.* and their heirs, and if she died without *such heir* of her body, then over. This was holden to be an estate-tail in *L.*

Lord Glencrochy v. Bosville.

Cas. temp.

Talb. 3.

Supra, p. 83.

(120)

And in a case before stated of a conveyance directed by will to one for her life, without impeachment of waste, remainder to the *issue of her body*, remainder over. Lord Talbot said, he should upon the first question make no difficulty of determining it an estate-tail, had it been an immediate devise. Now in this case the subsequent words were *issue of the body*, instead of *heirs of the body*, which puts Lord Talbot's opinion in favour of the general rule, in a very strong light, when we consider that the word *issue* is not so appropriated a word of *limitation* as the word *heirs*, as I have observed in a preceding page.

Supra,
p. 107.

Vide supra,
p. 83. 95.

In the case of *Papillon* and *Voice*, which I have before cited, Lord Chancellor King agreed, that the *intent was plain* to give an estate for *life only*, with a contingent remainder of the inheritance, upon the clause appointing trustees to preserve contingent remainders; yet held, that this remainder was within the general rule, and must operate as words of limitation; and consequently create a vested estate-tail in *B.* and that the breaking
into

into this rule would create the utmost uncertainty.

Again in the case of *Coulson and Coulson* in Chancery, which was a devise to C. for life, remainder to A. and B. and their heirs to support contingent remainders during the life of C. remainder to the heirs of the body of C. lawfully begotten. Upon a question, whether C. took an estate-tail or for life, a case was stated for the opinion of the judges of B. R. who all certified that an estate-tail in remainder vested in him.—Here it was the intent of the testator to give only an estate for life, if he meant any thing by the interposition of trustees to support contingent remainders; for if he did not intend such an estate, as might determine by forfeiture or otherwise in C's lifetime, there was no room for the estate to trustees during the life of C.; and unless he meant that the heirs of C. should take by purchase, and not by descent, there were no contingent remainders to be supported.*

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Coulson. v. Coulson.
2 Stra. 1125.
2 Atk. 246.
and vide
Hodgson, and ux. v. Ambrose infra. p. 139.

So in a subsequent case of *Sayer and Masterman* in Chancery in 1757, before the lords com-

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* In the last edition of this essay, the author took occasion to insert in a note at this place, a copy of what he had been informed was the opinion of Lord Mansfield, when

Sayer v.
Masterman.
And vide
same Case
Ambl. 344.

(123)

commissioners of the Great Seal, *Willes*,
Smythe and *Wilmot*, where there was a devise
in the following words, *viz.* " And in case I
" die, not leaving issue born at the time of
" my death, or *en ventre sa mere*, which shall
" afterwards be born alive, I do further give
" and devise after the death of my said wife,
" to my brother *E. S.* all those my several
" estates or farms at &c. during his natural
" life, with power of making any jointure or
" jointures upon any woman or women
" he shall marry, and after his decease
" to such child or children as shall lawfully
" be begotten by him, the males however to
" be preferred before the females, and they
" to succeed according to their births; and
" in trust to preserve the contingent remain-
" ders from being barred during the life of
" the said *E. S.* I do give the said several
" estates and farms to my dear friend *Dr. R.*

Vide Dougl.
Rep. 323.
Infra. 139.

when Solicitor General, upon the case of *Perrin* and
Blake. But his Lordship having thought proper to dis-
avow such opinion from the bench, in the late case of
Hodgson & Uxor v. Ambrose, (noticed in the sequel of
this essay) that note is now become improper; and the
author in justification of himself must beg leave to refer
his readers to his printed address to Lord *Mansfield* on
that occasion, and the copies of opinions annexed to it;
to which he might add some others which he has been
since favoured with.

" And

“ And after the decease of my said brother,
 “ and on failure of issue as aforesaid, I give
 “ the said several estates and farms to my
 “ loving brother G. S. and the heirs of his
 “ body, the males having preference as afore-
 “ said, and succeeding according to their
 “ births, and to preserve the contingent remain-
 “ ders from being barred during the life of the
 “ said G. S. I give the said estates and farms
 “ to my said friend Dr. R. and on failure of
 “ issue of the said G. S. I give the said estates
 “ and farms to my said niece M. C”—E. S.
 died without issue. The question was, whether G. S. took an *estate-tail* or only an estate for life under the said will? And the court held, that the whole inheritance was not vested in the trustee in this case; that he took only a descendible freehold during the life of G. S. for the word *estates* there meant only the thing and not the interest, it being coupled with the word *farms*. That by inserting the limitation to the trustee next after the limitation to G. S. the case would be like *Coulson v. Coulson*, with this difference, that it would not be quite so strong; because the estate was not given to G. S. expressly for life. They referred to Lord King’s opinion in *Papillon* and *Voice*, that the limitation to trustees did not controul the estate-tail; and the Court declared that G. S. was intitled to an estate-tail.

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King v.
Burchell.
Amb. 378³⁷⁹

In a case before Lord Keeper *Henley*, where one devised, after his wife's death and failing issue of her body, a messuage &c. in *Hunton* to *J. H.* for life, remainder to the issue male of *J. H.* and to his and their heirs share and share alike; and for want of such issue, to the issue female of *J. H.* and her and their heirs; and for want of such issue to *W. B.* his heirs and assigns for ever. He also gave other houses at *Maidstone* to his wife, remainder to *J. H.* for life, and from and immediately after the determination of that estate to the issue male of the body of *J. H.* and to their heirs, and for want of such issue to *W. R.* his heirs and assigns for ever; with a proviso that the bequest and limitation of all the premises limited to *J. H.* and such issue male and female, was upon special consideration, that if *J. H.* or his issue or any of them, should alienate, mortgage, or incumber, or commit any act or deed to alter, change, charge, or defeat, the bequests (they) should pay, &c. and he did thereby charge the premises with the payment of 2000*l.* unto such person or persons, and his or their heirs, who would, should, or ought to take next, by virtue of any of the bequests or limitations.

J. H. having no son but two daughters who were heirs at law of the testator; he joined

joined with his said daughters, in suffering a recovery of the *Maidstone* estate. Upon which, the plaintiff brought his bill for payment of the 2000 *l*.

In support of the claim, it was argued, that *J. H.* took only an estate for life—it was expressly limited to him for life, and the super-additional words of limitation (to the words issue-male) strongly indicated his intention—That the word *issue* was naturally a word of *purchase*; that the intent was to be collected from the whole will; that in the first clause relating to the *Hunton* estate, which was limited to the issue-male and *their heirs, share and share alike*, *J. H.* could not, by any construction be intitled to more than an estate for life.—That the remainders were contingent to issue-male if any, in fee; if not, then to *J. B.* and were therefore destroyed by the recovery—and it was said, that if *J. H.* was *tenant in tail*, the condition was good; for, though a condition to restrain tenant in tail from suffering a recovery was not good; yet a condition not to alien was; that it was not barred by the recovery, because it was said, to run with the land.

Vide infra
182, 183.

On the other side, it was contended, that *J. H.* took an estate-tail; that the intention
was

Infra 182,
183. 310.

was plain, for the testator had restrained the *issue of J. H.* as well as *J. H.* himself, from aliening; which would have been absurd, if he had intended to give them the *fee*: That the proviso was against law; it was to restrain what was incident to an estate tail, and therefore void---that if not void, yet it was barred by the recovery, being a subsequent charge.

The Lord Keeper after consideration, gave his opinion, that *J. H.* took an estate-tail, and that the proviso was repugnant to the estate.

And Vide
Roe on de-
mise of Dod-
son v. Grew.
Infra 114.

This, we may observe, was a pretty strong case; the limitation being not to *heirs-male*, but *issue-male* with words of limitation in fee superadded, aided by the connection, in the proviso, of the devise of the estate in question with that of the other estate, which had been limited to the issue-male *his or their heirs share and share alike*. But the extent of the proviso to the issue was very strong against their taking in fee. And should it be urged, that the implication from that circumstance, might possibly have been satisfied, by an estate *tail male*, in the issue male as *purchasers*, instead of an estate *in fee*; the answer is, that would have been either rejecting the words *their heirs*, or reducing them by a constructive

constructive qualification into *beirs male*; which would at once have removed the *only objection*, afforded by the circumstances of the case, against the ancestor's taking an *estate-tail*, and have left no argument for the issue male taking by *purchase at all*; instead, as in *Wright* and *Pearson*, of throwing the case open to those *other arguments*, in favour of the *beirs &c.* taking by *purchase*, which had prevailed in *Bagshaw* and *Spencer*.

Vide *supra*.
P. 93.

This case is cited 2 *Burr.* 1103. as a limitation to *J. H.* for life, then to the *beir-male* of *J. H.* and *his beirs*, and for want of such issue then over; as referred to in the former edition of this essay; but the report of it, since made public, has corrected the error of that reference.

And vide
note 3 *Durnf.*
& *East Rep.*
145.

Here I cannot help noticing a case, though prior in time to several already noticed; which was a devise to *A.* and *his issue*, remainder to *B.* and his issue, remainder to the *beirs* of *A.*—*A.* died in the life-time of the testator; and it was adjudged by the whole court, that the heir of *A.* took nothing, because the word *beirs* was a word of *limitation*. The words of Lord Chief Justice *Parker*, in delivering the opinion of the court upon this case, are remarkable: "And thus (says he)
" has

Goodright.
v. Wright,
1 P. W. 397.
Vide 2 *Vern.*
722. *Prec.*
Chan. 439.
Strange 445.
Hodgson v.
Ambrose.
infra 139.
White v.
White in the
Lords, 1782.
1 *Brown's*
Rep. Canc.
219 in note.

(125)

Vide Plowd.
341.And vide
Case cited.
3 Leon. 20
in Cranmer's
Case. And
Wynn v.
Wynn.
Vin. v. 8.

P. 273.

2 Eq. Ab.
360.3 Brown's
Ca. Par. 361.

"has the law been long clearly settled as to
 "this point, ever since *Brett and Ridgen's*
 "case; but on this occasion I have been the
 "larger in delivering the judgment of the
 "court, because of some *late endeavours* to
 "invalidate this rule; which by the way may
 "make it proper to observe, that the *altering*
 "*settled rules* concerning property, is the
 "most dangerous way of removing land
 "marks."

It is natural to suppose, that the reader's
 curiosity must have been awakened to learn,
 upon what principles, it was possible to get
 rid of so strong a system of authorities as the
 foregoing. He might be led to the reflection,
 that, however well old cases did for old times,
 still those cases and those times kept equal
 pace, and both grew *antiquated* together?
 That whilst in other sciences every age pro-
 duces its own improvements, it would be
 singular to treat the science of the law, as the
 only stationary branch of human knowledge.
 He might, perhaps, recollect the laudable
 ambition inculcated in the lines,

(126)

———— *proavos et quæ non fecimus ipsi*
Vix ea nostra voco —————

Such

Such reflections would prepare him to be told, that in the case of *Perrin and Blake*, the court of K. B. held, that precedents in general are rather apt to confound; that every case has its peculiar circumstances, and therefore ought to stand upon its own bottom; that wherever an *old* maxim, the *policy* of which had ceased, could justly be departed from, it ought to be done; and that the remnants of *antient strictness*, were things to be dis-
countenanced.

(127)

It is true, that, in the arguments upon the case of *Perrin and Blake*, it was insisted; that several of the cases, which I have before observed to have been cited in support of the determination in that case, were instances of the words *heirs of the body* having been taken as words of purchase; and that, as to the cases cited in support of the rule, all those wherein there was no limitation to trustees to support contingent remainders, were not strictly applicable to the question in that case; that the intention was plain to make the heirs of the body take by purchase; the cases adduced, wherein they had been admitted to take as purchasers, proved there was nothing contrary to law in such intention, and therefore such intention ought to be effectuated.

(128)

But upon this sort of argument, we are to observe, that in regard to the cases wherein the words *heirs of the body* were admitted to operate as words of purchase, there is not one of them that falls within the literal extent of the rule; which, I conceive, sufficiently appears from the observations I have made in my examination of those cases. Therefore though it was not *illegal* to construe the words *heirs of the body* to be words of *purchase*, in cases that did not fall within the rule of *legal* construction, which says they shall be words of *limitation*; that proves nothing in regard to the *legality* of such construction, in another case which wants every one of the circumstances, that took those cases out of the extent of *that rule*. And as to the cases, which want the limitation to the trustees to support contingent remainders, not being applicable to the question in the case of *Perrin and Blake*; it must be allowed, that many at least of those cases, contain strong arguments of intention (as strong, as perhaps, if not stronger than, that of limiting an estate to trustees to support contingent remainders) that the *heirs of the body* should take by *purchase*; and therefore such cases directly apply to prove, that in those cases to which the rule of construction now under consideration extends, that rule is sufficiently strong, to controul the *intention* when not more decisively declared, than by a limitation

limitation to trustees to support contingent remainders. Besides, without recurring to any other cases, why were not the authorities of the cases of *Papillon* and *Voice*, *Coulson* and *Coulson*, *Sayer* and *Masterman*, and *Wright v. Pearson*, in every one of which there was a limitation to trustees to support contingent remainders, sufficient to rule the case of *Perrin* and *Blake*? Indeed upon examining the matter, the limitation in these cases to trustees to support contingent remainders, seems to set the force of the two arguments upon the intention, and upon the testator's being *inops concilii*, in direct opposition to each other. For if we suppose the testator acquainted with the necessity or use, of limiting an estate to trustees to support contingent remainders; it scarcely seems reasonable, to suppose him unacquainted with the legal nature and force, of a limitation to the *heirs* of the body after a preceding estate for life: and then as we cannot say he is *inops concilii*, there exists no pretence, for construing his words otherwise than according to their legal import and operation. On the other hand, if we admit he did not understand the use or intention, of the limitation to trustees to support contingent remainders, but only used it because he had seen it used in some other will or settlement; then no particular intention can be inferred from his inserting that clause.

(129)

But admitting that those who argue against the strict observance of the rule I have been speaking of, should chance to have the intention of the testator on their side; it remains for them to consider, whether a rule of law, inviolably observed for more than three hundred years past, can ever be a decent sacrifice, to the presumptive construction, of an indetermined or illiterate testator's intention.

(130)

So long as certain technical expressions shall be allowed their fixed legal import and operation; it will be in any man's power to secure the limitation of his property from litigation and arbitrary construction; by applying to those whose business it is to be acquainted with the force and import of such expressions. Where any considerable property is concerned, a man's own interest in securing the effect of his intention will lead him to such a step. Where the property is so inconsiderable, as not to be thought worth the trouble or expence of such assistance, the disposition of that property, and of course the testator's intention with respect to it, is less material and momentous. Some cases, it is true, may happen, wherein such application may accidentally be impracticable; but is every testator to be denied this power of effectuating his intention, because accident may put it out of the reach of some few,
and

and some others may want inducement to use it?

If no technical expressions are to be exempt from the operation of an *occasional discretionary* construction, where is the testator who can make his *own* will? The most careful and guarded endeavours which a man shall exert for that end, will only amount to leaving some precarious instructions behind him; the force and effect of which, must depend on the discretion or disposition of those, in whom the power of construction shall be reposed for the time being; it is their discernment or constructive talents, must in fact *make* the will, of every testator whose property shall be worth the experiment.

(131)

The court of King's Bench, in delivering their opinion upon the case of *Perrin v. Blake*, seemed to lay a considerable stress upon arguments of *convenience* and *policy*. But, I must confess, that all which I have heard urged upon those grounds, so far from supporting the judgment in that case, appears to me to afford very solid reasons against it. It was said that the established distinction between *legal* estates and *trust* limitations, might be attended with inconveniences, from the difficulty which sometimes might occur in determining whether a limi-

tation gives a *trust* only, or *legal* estate. But this is a difficulty of that sort which rarely, very rarely, has ever occurred; and upon the long established rules of construction very rarely can occur. It is impossible, indeed, to say what variety of new questions, new principles of construction may introduce; but certain it is, that whilst old distinctions between the words creating mere *trusts* and *legal estates* shall prevail; for every *single* question that can arise, as to the effect of a limitation in that respect, at least *an hundred* disputes must arise about the discretionary construction of a testator's intent.

(132)

2 Atk. 246.
570, 577.
Supra, p. 84.

In the case of *Bagshaw v. Spencer* the *Master of the Rolls* clearly agreed with Lord *Hardwicke*, as to its being a *trust estate*: though the first denied that latitude of construction to a *trust* not executory, which the other admitted upon the score of its being a *trust* and not a *legal* estate.

It was also observed in the arguments in the case of *Perrin v. Blake*, that in a commercial country, every clog should be removed which tends to obstruct the circulation of property: But, how the decision in question could be supported on such a ground, I am at a loss to apprehend.

The

The construction adopted by the court of King's Bench, in the case of *Perrin v. Blake*, so far from *unlocking* property, really ties it up for a longer period, and imposes a more *strict clog* upon it, than the limitations commonly used in marriage-settlements; where the lands are strictly settled upon the husband for life, remainder to trustees to support contingent remainders, remainder to the wife for life, remainder to the first and other sons successively in tail — For in such settlement, the first son that attains the age of twenty-one years, may, with the consent and concurrence of his father, by suffering a recovery, unfetter the estate, and make a new settlement upon his marriage, or other desirable occasion. But it is quite otherwise in regard to a limitation to the father for life, remainder to trustees to support contingent remainders, remainder to the *heirs of the body* of the father, if we construe the subsequent words *heirs of the body*, as words of purchase, giving a contingent remainder to the *heir of the body*; for then as *nemo est heres viventis*, it is impossible to say who will be *heir of the father's body* till his decease; and consequently it will be out of the power of the father and eldest, or any other child, to make any secure and effectual disposition or settlement of the estate, either upon marriage or any other the most important or advan-

(133)

tageous occasion. The inheritance must remain suspended during the father's life ; and though he should have half a score children, yet should he live to an old age, and survive them, the estate cannot vest in any of them ; but may, perhaps, become the property of some remote remainder-man, whose name probably was inserted in the will, only to wind up the general round of limitations.

(134) Such a mode of construing wills, if once fully established, would open an almost unlimited power to the judge, of disposing of the property of testators, and directing the *circulation* of it to his *own mind* ; and that, I take it, is the only sense in which it could fairly be said to remove any *clog* upon the *circulation* of property.

If rules and maxims of law, were to ebb and flow with the taste of the judge, or to assume that shape, which in his fancy best becomes the times ; if the decision of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature ; I should be glad to know, what person would venture to purchase an estate, without first having the judgment of a court of justice, respecting the identical title under which he means to purchase ? No reliance could be had upon precedents ; former resolutions

lutions upon titles of the same kind could afford him no assurance at all. Nay even a decision of a court of justice upon the very identical title, would be nothing more than a precarious temporary security; the principles upon which it was founded, might, in the course of a few years become *antiquated*; the same title might be again drawn into dispute; the taste and fashion of the times might be improved; and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor, as that predecessor did to the maxims and decisions of those who went before him. Thus, so far from opening a door to the circulation of property, the prevalence of such a doctrine must prove the most effectual obstacle to it; for men will be very cautious how they venture upon the purchase of property, the enjoyment of which must depend wholly upon such *fluctuating temporary* rules of construction.

(135)

Another plausible ground advanced in support of the judgment of the court of King's-Bench in the case of *Perrin v. Blake*, still remains to be examined. It was there laid down as a principle, that the intention of the testator should be the sole rule of construction, in all cases of devises; and that such intention

intention when explained, should control the *legal* import of any term of art. That a principle of this nature, under certain limits and restrictions, does and ought to prevail, I believe no one conversant in our laws will attempt to deny; but that such a principle has never yet been admitted, in the latitude there laid down, seems to be proved beyond controversy, by all the several cases I have before cited. And that no such unlimited principle ought ever to prevail, may, I think, be clearly demonstrated from the infinite uncertainty, inconvenience, and vexation, which it must necessarily produce.

Vide also,
2 Atk. 575,
576.

(136)

Certain established maxims, as to the legal import and effect of technical expressions; will render the decision of titles to property as little dependent as the nature of things will admit, upon the occasional opinion, humour, ingenuity or caprice of the judge; and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained; and under them a permanent peaceful enjoyment may be expected.

Construction depending on, and guided by certain fixed known rules, will not be liable to those various temporary influences, which must necessarily have a share in directing

ing the discretionary decision of any court upon earth: no inducements can arise, no room can be left to dispute or litigate titles built on such a stable foundation. Whereas, on the other hand, the implied intention of a testator is at best uncertain; frequently very doubtful; favour, affection, caprice, nay different habits of thinking, and modes of expression in different men, will occasion different constructions of the same will. Very often, I'll venture to say, a testator himself would be at a loss to fix or expound his own intention, when the reason, humanity, or ingenuity of a judge, might conceive it clear as day-light. Whoever has been conversant in settling the wills of testators, must often have experienced the truth of this position; and if a testator himself is at a loss to ascertain or expound his own intention, we are certainly not to wonder, that other men should differ widely in their constructions of it. What reliance can be had on a title raised on so precarious a ground? What security of enjoyment can be expected under it? Setting aside all those grounds for differences in the construction of the same will, which may arise from different degrees of understanding, apprehension, or discernment in different men; it is certain, that different ambitions, interests, party principles and private connections, will ever lead men to differ and dispute about

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about the construction of a will, as well as about any other act in which those motives are concerned.

It is evident, therefore, no sort of reliance can be had upon titles depending on DISCRETIONARY CONSTRUCTION, until they have received the sanction of a court of justice. A suit commenced in one court, in cases which depend upon such construction, generally produces an appeal to a superior court; thus are vexatious suits continually encouraged and multiplied; innocent people perpetually harrassed; and estates spent ten times over, in endeavouring to ascertain the titles to them.

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Is there any thing impolitic, any thing harsh in deciding, that the intention of the testator should never be so far indulged, as to control all established rules of construction?—Whenever the construction, upon the apparent intent of the testator, is not contrary to the construction upon certain established legal maxims, respecting the import of terms made use of by him, so far let the apparent intent be the guide in the construction, but not one jot further. And wherever the terms of art made use of, do not fall within the allowed extent of any established legal maxim respecting their import and operation,

tion, there let the intent be the *sole guide* of construction; because there, a more certain or better rule of construction is not sacrificed to it. These are distinctions which have long since prevailed in our courts of justice; and which appear to be founded in good reason, and *permanent useful policy*. — Surely it is better that the intentions of twenty testators, every week, should fail of effect; than those rules should be departed from, upon which the general security of titles and quiet enjoyment of property so essentially depend.

(139)

Where, in the name of wonder, can be the convenience, where the *policy*, of directing our attention and solicitude, to substantiate the *conjectural* intentions of the dead, at the expence of so much perplexity, strife, litigation, and distress to the living? How much more rational and better calculated for the great ends of society, is the doctrine recommended by Lord *Mansfield* in the case of *Doe and Laming*, were his Lordship's words, as reported in 1 *Burrow* 1106. merit our most serious attention, no less for the justness of the observation, than for the real importance and utility of the advice they contain. "It is to be LAMENTED (said his Lordship) that questions of this kind have occasioned so much LITIGATION and EXPENCE. The BEST way

Supra p.
107.

" way to SETTLE them is to reduce the matter, if possible, to some CERTAIN RULES."

Indeed, we have the happiness to find, that the doctrine thus recommended by Lord *Mansfield*, has not failed of commanding the respect due as well to its own merit, as to the abilities of the learned Judge from whom it proceeded. It is with pleasure, I recollect some recent decisions, which I could wish to cite, nay dwell upon, as instances of attention to *established* RULES; but the nature of my professed design in these sheets, confines my notice to cases immediately relative to the subject I am treating of.

Hayes v.
Foorde.
2 Black.
Rep. 698.

*N** Thus in the case where a testator having two sons and a brother *W.** who had also two sons, devised to his eldest son for life, and after his decease, to *his* (the son's) eldest son that should then be living, and if he died without any son or sons to enjoy it, during their lives (of which none should be tenants but whilst they lived to enjoy it) that then it should come to his (that son's) brother *W.* during his life, and to any of his heirs male during their lives, and no longer; and if they died without issue male then to the *beirs-males* of the testator's brother *N*'s sons, and to any of *their beirs-males* during their lives, of which
none

none of them *were tenants any longer*, nor should it be in any of their powers, to sell, dispose or make away any part or the whole of it; and in case they all died without issue, then to the testator's next of kin—And by a schedule, published at the same time, with the same solemnities, and referred to in, and by the special verdict found to be part of, the will, purporting to be an account how the testator disposed of his estates, after noticing the limitations to his sons and their sons, he said, “and for want &c. to his brother *N's sons*, and for want of any sons then over.”

The testator's two sons died without issue male; one of the brother *N's sons* survived them, and taking possession on the decease of the survivor of them, he afterwards suffered a recovery. And upon a question whether he took an estate for life or in tail, the court of King's Bench in Ireland were of opinion, that he took only an estate for life.

But the judgment in *Ireland* was reversed by the Court of King's Bench here; and Lord *Mansfield* on delivering the opinion of the court, stated the only doubt to be, whether by the words of the will, the nephew of the testator took any estate by implication; that this doubt was removed by the schedule which expressly gave an estate *to the sons* of the testator's

Vide of this
point in this
case, *supra*
p. 64.

tator's brother *N.* therefore the nephew took an estate for life, by implication, thus explained; which being conjoined with the estate expressly given to his *heirs-males*, would by the known rule of law, give him an estate in tail male. That the restrictions afterwards imposed by the testator, were inconsistent with the estate so given, and therefore void; and that the nephew having suffered a recovery, had legally barred the estate tail.

Here we observe, that the testator's express restriction of the power of alienation, even aided by the words of *limitation*, superadded to *heirs-males* of his brother's sons &c. was not allowed to repel the operation of the rule.

Hodgson and
Uxor v. Am-
brose.
Doug. Rep.

And a subsequent case has fully established the doctrine, in *Coulson and Coulson*; it was a case where *S.* devised certain lands to trustees and their heirs, to the *use* of her sister *E.* and her assigns, *for and during the term of her natural life*; and after the determination of that estate, *to the use of the said trustees and their heirs, during the life of the said E.* upon trust, to support and *preserve the contingent* uses and estates, thereafter limited, from being defeated or destroyed; and for that purpose to make entries, and bring actions as the case should require, but nevertheless to permit and suffer the said *E.* and her assigns, during her

her life, to receive and take the rents, issues, and profits thereof, to her and their own use and benefit: and from and after her decease, then *to the use and behoof of the heirs of the body of the said E.* lawfully issuing; and for want of such issue, then to the use and behoof of her sister C. and her assigns, for and *during the term of her natural life*; and from and after the determination of that estate, *to the use of the said trustees and their heirs* during the life of the said C. upon trust to support and preserve the *contingent* uses and estates therein-after limited, from being defeated or destroyed; and for that purpose to make entries and bring actions as the case should require, but nevertheless to permit and suffer the said C. and her assigns, during her life, to receive and take the rents, issues, and profits to and for her and their own use and benefit: And from and after her decease, then *to the use and behoof of the heirs of the body of the said C.* lawfully issuing; and for want of such issue, then to the use and behoof of the testator's own right heirs for ever. E. died in the testator's life-time, leaving issue one daughter B. who survived the testatrix. C. the other sister, after the testator's death, suffered a recovery of the said estates, and afterward marrying, her husband and she contracted for the sale of the said estates to A. who declining to complete his purchase, on account of a ques-

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tion, whether *C.* took any greater estate than for her life, under her sister *S.*'s will, the vendors filed a bill in Chancery against him, for a specific performance of the contract. Upon the hearing of the cause, the Chancellor ordered a case to be stated for the opinion of the Judges of *B. R.*

First, Whether *B.* the daughter of *E.* took any, and what estate under the will of *S.*?

Secondly, What estate *C.* took under the said will?

April 1780.
Doug. Rep.
330.

The case being argued before the Judges of *B. R.* they delivered their opinion, that if *E.* would have taken an estate tail in case she had survived the testatrix, they thought by her dying before the testatrix, it was a lapsed devise, and *B.* the daughter of *E.* could take nothing.

As to the question whether *E.* would have taken an estate tail, whatever their opinions might have been if the case were new, they thought, as the case of *Coulson* and *Coulson* was literally the same, the precise question ought not to be again litigated; and by that authority they were bound to say, in the words of the certificate in that case, that as it appeared by the state of the case, that there was, after the determination of the estate for
life

life to *E.* a devise to trustees and their heirs for and during the life of *E.* they were of opinion that *E.* if she had survived the testatrix, would have taken an estate for life in the premises devised to her, not merged by the devise to the heirs of her body; but by that devise an estate-tail in remainder would have vested in the said *E.*; consequently *B.* the daughter of *E.* took no estate under the will of *S.*; but *C.* took an estate for life in all the devised premises not merged by the devise to the heirs of her body; but by that devise an estate tail in remainder vested in the said *C.* And upon the case coming on again before the Chancellor, his Lordship decreed that the contract should be specifically performed and carried into execution.

And upon an appeal from the above-mentioned decree to the House of Lords, the following questions being put to the judges: First whether *B.* the daughter of *E.* took any and what estate under the will of *S.*? Secondly, what estate *C.* took under the said will? The lord chief baron delivered the unanimous opinion of the judges present, upon the first question, that *B.* took no estate under the will of *S.* And upon the second question, that *C.* took an estate for life in all the devised premises not merged by the devise to the heirs of her body; but by that devise an

July 1780.

Vide Dougl. Rep. 331. in note.

Vid. White v. White and other cases cited supra in margin 123.—4.

Feb. 1781. *estate tail in remainder vested in the said C.*
Whereupon the decree was affirmed.

Thong v.
Bedford.
I Brown
Canc. Caf.
313.

And in a case, where the testator devised to his wife for life, remainder to trustees to preserve contingent remainders, and immediately after the decease of his wife, he gave the same to his daughter for her life, remainder to the same *trustees to preserve* contingent remainders during the life of his daughter, remainder to the heirs of her body lawfully begotten, remainder to testator's grandson his heirs and assigns, and proceeded, "*It being my will and meaning, that after the decease of my wife, my said daughter shall have only an estate for life in the premises. And that after her decease, it may go to the heirs of her body; and in default of such heirs, should vest in my grandson and his heirs; and that my said daughter shall not have any power to defeat my intent:* And he gave powers to his trustees to do all necessary acts to effectuate his intention.

After the decease of the wife, a bill being filed by the grandson, to have a conveyance made by the trustees, in which the daughter should be *only tenant for life*, with limitation to her sons and afterwards to her daughters in strict settlement; a demurrer to this bill, on the ground of the daughters being seised of a *vested estate tail*, was allowed.—Lord
Loughborough,

Loughborough, in stating the opinion of the court, said, the case depended on two points; first it was contended for the defendants, that the devises were of *legal estates*, consequently that the trustees had no estate to convey. That if that proposition were true, the consequence was clear, that the demurrer must be allowed. Secondly, That supposing them *equitable estates*, the daughter was intitled to a *vested estate tail*, consequently a conveyance would be nugatory; that the second question involved the consideration of several important cases as *Bagshaw* and *Spencer and Garth v. Baldwin*. That it was unnecessary to enter into that question, if the former was clear. And the court were all agreed that the estates were *legal*—that the first to the wife was a clear legal estate, that to the daughter was also a clear legal estate. That after the widow's *unnecessarily*, and after the daughter's *necessarily*, as the parties thought, were introduced trustees to preserve contingent remainders, who took clear *legal estates pur autre vie*—that the subsequent words went to restrain the estate of the daughter; how far they would operate, was a proper question for *another* jurisdiction—that they were not stronger than the words that had been used in other cases; as in *Robinson v. Robinson*, 3 Atk. 736; the giving an estate, *without impeachment of waste*, or the interposing *trustees to preserve contingent remainders*; that as to what was con-

T 3

tended,

And vide
2 Vez. 225.
1 Burr 38.
5 Brown
Parl. Cas.
278.

tended, of the *power* given to the trustees requiring *a fee in them* to enable them to effect it, it would be going too far, to enlarge their estates by these words; it would be to render other words in the will useless; the estates to them for the lives of the wife and daughter, must *be struck out*; they could not have a *legal fee* and estates *pur autre vie* at once, in the same lands. The meaning only was, that they should have the powers *incident* to their character of *trustees to preserve contingent remainders*.

Lord Loughborough's reference in the above case to *Robinson v. Robinson*, and the cases giving an estate *without impeachment of waste*, and interposing trustees *to preserve contingent remainders* was very well directed; for they all clearly import or confirm the intention, that the first devisee shall take *only* an estate for life. Indeed the *restricted limitation* to such devisee *for life*, expressly says as much; and the nature of every testamentary disposition, intrinsically and necessarily implies all that can be expressed in any annexed declaration, that the devisee *shall not have any power to defeat the testator's intent*.

And vide
6 Brown
Cas. Parl.
227.

I shall now proceed to remark, that although words of limitation grafted on the words *heir-male*, or *heir of the body* in the singular

gular number, may convert them into words of purchase, as in *Archer's* case, and in the case of *Cbeck* or *Clerk* and *Day*, before cited; yet those words, though in the singular number, if not attended with words of limitation upon them, are not words of purchase. For this, we may recur to *Burley's* case which as cited by *Hale*, C. J. 1 *Ventr.* 230, was a devise to *A.* for life remainder to the next heir-male, and for default of such heir-male then to remain; and it was adjudged an estate-tail in *A.*

(140)

Burley's case.
1 *Vent.* 230.

So where there was a devise to *R.* one of the testator's sons for ever, and after his death to the heir-male of his body for ever, and for default of such heir-male to testator's other son; it was held that *R.* took an estate-tail. And in the case of *Paufey v. Lowdall* above cited, the heir took by descent, though the limitation was to the heir in the singular number.

Welkins v.
Whiting.
1 *Bullstr.* 219.
1 *Roll. Abr.*
836.

Supra 114.

And here we may notice the opinion to the same effect, in the case of *Gold v. Goddard*, 2 *Jo.* 111. though it involves other points irrelative to the present purpose.—And where an estate was devised to *B.* and such heir of her body as should be living at her death, and in default of such, the remainder over. The court held, that the limitation gave *B.* an estate-tail; that a devise to one

Richards v.
Lady Bergavenny.
2 *Vern.* 324.

for life remainder to the *heir of his body*, though in *the singular number*, is an estate-tail; but if the limitation were as in *Archer's* case, to *A.* for life, remainder to the *heir of his body in the singular number*, and to the *heirs of the body of such heir*, there *A.* would be only tenant for life.

Supra p. 105.
And vide
Com. Rep.
301.

So in *White v. Collins* above cited, it was held, that the limitation being to the heir-male &c. in the singular number, would not alone have prevented the construction of an estate tail.

Miller v.
Seagrave,
Robinson's
Gavelkind
96.

And where there was a devise to *M.* and his wife for their lives, remainder to the *next heir-male* of their two bodies; it was held a devise in tail; for that a devise to the heir-male was a devise in tail, unless there are words of limitation superadded, so as to bring it within the reason of *Archer's* case, and that the words *first*, *next*, or *eldest* make no difference.

Trollop v.
Trollop,
ibid. and
Ambl. 453.

And in another case of a devise to testator's eldest son for life, remainder to his first son for life, remainder to the right heirs male of his body; remainder to other sons of *W.* and the heirs male of their bodies; remainder to the testator's son *T.* for life, and after to the *first heir-male* of his body, remainder over:
the

the court of C. B. held that the words *heir-male* were to be understood collectively, and gave an estate-tail to T. it being distinguished from *Archer's* case, by no *limitation* being superadded to the words *first heir-male*; and the word *first* signifying *first* in order of succession from time to time. And the court of King's-Bench affirmed the judgment of C. B.

Lord Chief Justice *Eyres* in delivering the opinion of the court on the last cited case, refers to Lord *Coke's* observation, 1 *Inst.* 22. that of all the estates tail most coerced and restrained that he found in our books, was the estate tail, 39 *Aff.* 20, where lands were given to a man and his wife, and to *one heir of their bodies* lawfully begotten and to *one heir of that heir only*. And this the Chief Justice notices, as a contradiction to the opinion Lord *Coke* had before delivered, 1 *Inst.* 8. b. "That if a man give lands to one and his *heir* in the singular number, he hath but an estate for life," and he remarks, that the reason given by Lord *Coke*, that the heir should take nothing because he was *but one*, can never hold; when it is considered, that there can be but *one heir at one time*; for heirs are to take one after another in a course of descent; and there can be but one heir at once; and that there was also a considerable authority,

Vide Harg.
n. 4.
Co. Lit. 8.
b.

Vide Co.
Lit. 22. a.

authority, *Reg. Jud.* 6. to that purpose; where there was a *sci. fa.* brought by an *issue male* to execute a fine of lands, granted to his father and *hæredi masculo de corpore suo procreato*. And that there was no resolution in any book or court to the contrary, except in *Shelley's case* 1 *Co. Rep.* 104, which was only *arguendo*.

That the devise of the express estate for life, with remainder to the *next heir-male*, in the singular number, was said in the report of *Archer's case*, to be the reason why the court adjudged it an estate for life; but that in no case since that time, had it been *considered* or *understood* as a resolution on that single ground; but the subsequent limitation to the *heirs-male* of such *heir-male*, had been looked upon as the *true foundation* for that resolution: that it was said by *Hale* 1 *Vent.* 215. that a devise to one for life, and after his decease to his heir had been held a fee; for *heir* is *nomen collectivum*; but *Archer's case*, *Hale* said, was a devise to *A.* for his life, and after to his heir and to the *heirs of such heir*, in which case, he said, that because the words of limitation were tacked to the word *heir*, *therefore* heir was taken to be *designatio personæ*.

The case of *King v. Burchell*, had it agreed with what is cited 2 *Burr.* 1105. would have
been

been an exception to the doctrine, that the word *beir* &c. in the singular number attended with words of limitation, operates as words of purchase. — But the report of that case, from which I have taken the above statement of it, does not warrant any such conclusion: nor does the case of *Goodright v. Pullyn* appear to come quite up to it; as the limitation itself there was in the *plural number*, though the reference from the superadded words was in the singular.

But if the words be *beirs*, or *beirs of the body* &c. in the *plural*; in that case even words of limitation engrafted on them, if not inconsistent with the nature of the descent pointed out by the first words, will not convert them into words of purchase.

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For this *Shelley's* case is a direct and leading authority. In that case *Edw. Shelley* being tenant in tail, and having two sons, *H.* and *R.*, and *H.* the eldest dying in his father's life-time, leaving a daughter and his wife *enscint* with a son; *Edward* the father suffered a common recovery to the use of himself for term of his life, after his decease to the use of certain persons for 24 years; and after to the use of the *beirs-males* of the body of the said *Edward*, lawfully begotten, and of the *beirs-males* of the body of such *beirs-males* lawfully

Shelley's
Case.
1 Co. Rep.
93.

lawfully begotten, remainder over ; and after judgment and the awarding of the writ of seisin, but before its execution, *Edward* died ; and after his death, and before the birth of his eldest son's son, the writ of seisin was executed. And his youngest son *R.* entered ; and a son of the eldest son being afterwards born, the question was, whether his entry upon his uncle was lawful or not ?

One point in this case was, whether the words *heirs-males* of the body of *Edward Shelley &c.* being attended with words of limitation to the *heirs-males of the body of such heirs-males &c.* did not make the former, words of *purchase* : and in answer to what was urged in support of such a construction, it was insisted, that if *R.* being the heir-male of the body of *Edward* at his decease, were to take by *purchase*, the heirs-male of the body of *R. only*, would be inheritable ; and upon his death without issue male, the lands would remain over to strangers, in exclusion of all other sons of *Edward* and their issue male ; which, as the words were in the plural number, *heirs-males of the body of Edward*, would be against the very letter of the deed ; for by that means, the plural number would be reduced to the singular number, viz. to one heir-male of the body of *Edward* only ; and forasmuch as the first words *heirs-males of* the

the body of *Edward Shelley*, included the subsequent words *heirs males of their bodies*, (for every heir male of the body of the heir male of *Edward Shelley*, was in construction of law, an heir-male of the body of *Edward Shelley* himself) therefore the subsequent words were words *declaratory*, and did not *restrain* the former words. And it was ultimately resolved by the Chancellor and all the judges of *England*, except one of the Common Pleas, that *R.* came in, in course and nature of *a descent*; that he claimed the use by force of the recovery and of the indentures, by words of *limitation*, and *not of purchase*.

The case of *Goodright v. Pullyn* above stated, is an instance of the same doctrine applied to wills.—And Lord *Hardwicke* in the case of a devise to *R. M.* and the *heirs-male* of his body and *their issues*, held that *R. M.* took an estate-tail.

Minshall v.
Minshall.
1 Atk. 411.

So likewise in *Wright v. Pearson*, which I have before considered; the words of limitation *in fee*, superadded to the words *heirs-male &c.* did not prevent the construction of an estate tail.

Supra p 93.

And in a later case, where the testator devised lands to his nephew, to hold to him during the term of his natural life, and from
and

Dodson v.
Grew.
2 Will. 322.

and after his decease to the use of the *issue-male of his* body lawfully begotten, and the *heirs-male* of the body of *such issue male*, and for want of such issue male remainder over. The devisee had no issue at the time—the court of Common Pleas held, that he took an estate tail: and one judge said, he thought too great regard had been paid to the words, “heirs male of the body of such issue.”

There may, possibly, be some cases, where the superadded words of limitation may be admitted to control the preceding words *heirs*, *heirs male* &c. though in the *plural* number; when such superadded words limit an estate of a *different* nature to such *heirs*, *heirs-male* &c. from that which the ancestor would take, if the preceding words *heirs-male* &c. in those cases were taken as words of limitation.

1 Co. Rep.
95. b.
And vide
1 Atk. 413.

(142)

As in the case put by *Anderson* of a limitation to the use of a man for life, and after his decease to the use of his *heirs* and the *heirs-females* of their bodies; here the first word *heirs* would have given the fee to the ancestor, if taken as a word of limitation; whereas the subsequent words, *and the heirs female of their bodies*, grafted on that word *heirs*, could give only an estate-tail *female* to the heirs; in such cases the general effect of the first words *heirs of the body* &c. seems to be

be altered, abridged and qualified, by *such* subsequent express words of limitation annexed to them, *as cannot* possibly be satisfied by considering the first words as words of *limitation*. But we must take care to confine this observation to those cases, where the ingrafted words describe an estate descendible in a *different course*, and to different persons as special heirs, from what the first would carry the estate to, *viz.* to *males* instead of *females*, or *vice versa*; for where the first words give an estate-tail *general*, and the words ingrafted thereon are words serving to limit the fee; it seems by the general and better opinion, that the annexed words of limitation are not to be attended to; as may be seen in the above cited cases, of *Goodright v. Pullyn*, *Wright v. Pearson* and *King v. Burchell*, where the ingrafted words limited the whole fee.

Supra, p. 93.
118. & 124.
See my
case book
vol. 7. p.

Indeed there does not appear to be the same inconsistency in construing the first words, which describe *heirs special*, to be words of *limitation*, where the superadded words extend to *heirs general*; as there is where the first words, and those ingrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same persons; in the latter case it is absolutely impossible, by any implied qualification,

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qualification, to reconcile the superadded words to those preceding them, so as to satisfy both by construing the first as words of *limitation*; whereas in the former case, the superadded words are not *contrary* to or *in-compatible* with the preceding, but in their general sense *include* them; and there is no improbability in the supposition that they were used by the testator in the same qualified sense as the preceding; and then both may be satisfied, by taking the first, as words of *limitation*.

White v.
Carter.
Ambl. 670.

There is a case of an *executory trust*, wherein the words *heirs-male of the body* were construed into strict settlement, which ought regularly to have been inserted in a former page.—It was a bequest of personal estate to trustees, in trust to lay out the same in land to be settled and assured as *counsel should advise*, unto and upon the trustees and their heirs, upon trust and to and for the use of P. and the *heirs-male of his body* to take in *succession* and *priority of birth*, and for default of such issue male, then, upon further trust and to and for the use of B. and the *heirs-male of her body*, to take in *succession* and *priority of birth*, remainder over. And the testator ordered the trustees to pay the remainder of the interest dividends and profits, after deducting the expences of the trust, until the purchase

purchase or purchases made to *P.* and *R.* respectively, and to their *respective sons* and *issue male*, who should be *respectively intitled* to the rents and profits of the estates to be purchased. — Upon the question whether the lands to be purchased should be settled on *P.* as tenant in tail, or in strict settlement upon him for life, with remainder to his first and other sons in tail male; Lord *Northington*, on hearing, directed the settlement to be made on him *for life*, with remainder to his first and other *sons* in tail male.

Upon a rehearing Lord *Camden* was clearly of opinion to confirm the decree: and took a distinction between the case where a testator has given *complete directions* for settling his estate with perfect limitations; and where his directions are *incomplete*, and are rather minutes or instructions; in the *former case*, he said, the legal expression should have legal effect, though perhaps, contrary to his intention, as in *Garth v. Turner*; that in the *latter case* the court would consider the intention and direct *the conveyance* according to it. There, he said, the intention was very plain, the testator directed the *settlement* to be made by *advice of counsel*, and in *succession and priority*. He meant something different from an estate tail, when he wanted the assis-

Vide *Garth v. Baldwin*,
Supra 91.

tance of counsel; and though the words in *succession and priority* might have effect in case *P.* took an estate tail; yet they were meant to give an interest to the *sons* after the death of *P.*; that the latter clause put it out of doubt, he there explained his meaning by making use of the words *sons* and *issue*.—This case, we observe, ranks amongst those, where the courts have proceeded on the distinction between trusts *executed* and *executory* above treated of.

Supra, p. 93.

Of this vide
supra 58.

It remains for me to close the detailed view I have taken, of the several decisions on the rule in *Shelley's* case, with some general observations drawn from them, respecting the present extent and prevalence of that rule; abstracted from the remote *origin* of the rule itself, at a period and on principles, now problematical: what THEY WERE, may be left to the investigation of erudite curiosity, or the representations of prolific ingenuity; without much concern to those, whose only interest in the subject, rests on the calls of their professional attention, to the practical application of that rule at this day.

It may naturally be supposed, that a train of recorded decisions, have, or ought to have afforded some sketches at least, of the
general

general limits and distinctions, bounding and directing the operations of that rule: and so far indeed as respects limitations of *legal estates*, in conveyances by deed, its prescriptive claim to controul seems pretty well established; nor do we seem to be at much loss, as to its succumbency to more prevalent principles of construction in *marriage articles*. But in respect to dispositions by *will*, our conclusions are not so well determined; the difficulty arises from the indeterminate constructive nature of the instrument itself.

The cases as well as principles, tell us, the controuling rule of construction in wills, is the *intention* expressed, or clearly implied: To contradict this, would indeed be a mockery, a denial of the import of the word WILL. — On this broad ground some have driven the rule in question to a distance, that would in effect reduce it to no rule at all, by subjecting it to the controul of any expression not perfectly reconcileable with a *positive intention* of its admission; whilst others have, with a rigid degree of legal sternness, insisted on an inflexible adherence to the rule, without regard to any implicative contravention of its effect. It is obvious that neither of these doctrines is reconcileable with that train of decisions, which must, I conceive, be held to have pronounced the law on this point;

those decisions (if I do not mistake them) neither bend the rule to, nor support it against *every expression* or manifest indication of contrary intention. The one would be absolutely discarding it as a rule of construction in wills; the other would be rendering the legal effect of certain technical words in the very first line of a will, irrevocable through the whole sequel of it.

The amphibolous tendencies of cases and principles, seem to conspire in the production of a question, the solution of which may, by professional gentlemen, be truly termed the *hic labor* the *boc opus*. To attempt it with precision seems vain, until we can reduce all possible expressions or indications of intention, to certain classes or degrees of relative force: then indeed might we ascertain on a standard scale, what degrees of express or implicative indications of intention were *below*, and what *above* the controuling *index* of the rule: whilst that is out of our reach, what can we do more than resort to some general inferences, afforded by the comparison of the several cases in which the intention has been allowed to controul the rule.—Judge *Blackstone* in his justly celebrated argument in the case of *Perrin v. Blake*, to which I have had frequent occasions to recur, was thoroughly sensible of the necessity of such a resort for the

the solid ground of his argument; he accordingly, after some particular observations on the several cases in which the application of the rule had been denied, very fairly dismissed them by an arrangement, that shewed them all inapplicable to the case on which he was speaking, "all the cases that had occurred, he said, from the statute of wills to that time (a period of above two centuries) in which *heirs of the body* had been construed to be words of purchase, were reducible to these four heads—either where no estate of freehold was given to the ancestor, or where no estate of inheritance was given to the heir, or where other explanatory words were immediately subjoined to the former, or lastly, where a new inheritance was grafted on the heirs of the body; none of which was the case upon which he was then speaking—there was, therefore, no authority from *precedents* to warrant such a construction as was then contended for—he did not, however, say, that such construction could never be made, under *other* circumstances than those which he had then mentioned, but only, that he was not then aware of *any other* circumstances, that could warrant the same construction; at the same time, he allowed that the same construction might and ought to

1 Harg. Law
Tracts 507.

“ be made, whenever the intent of the testator was equally manifest.”

A more succinct, clear and at the same time comprehensive summary, of the characteristic distinctions of the several cases in which the rule in *Shelley's* case has not obtained, can hardly be framed, than what I have here cited from Judge *Blackstone*. I shall not, therefore, attempt a more concentrated view of the general description of circumstances that have been allowed to repel the influence of that rule: how far any more general inference may be extracted, even from that view, must be left to further inquiry.

1 Harg. Law
Tracts 574.

575.

Supra p. 58.

Vol 117.

V 300.

Mr. *Hargrave* in his original and spirited observations concerning the rule in *Shelley's* case, to which I have had occasion to refer in a former page, places the rule in a new point of view, by considering it as one of the barriers provided by our law to guard descent from being confounded with *purchase*; and on this principle that Gentleman's zeal pursues the rule to an inflexible degree of *imperative* controul, which would hardly be reconcileable with the long established principles applicable to the construction of wills, were it not for his resting the admission of the rule on a *previous question*, referable to the testator's

testator's intention.—Nothing can be better founded than Mr. *Hargrave's* doctrine, that the rule in *Shelley's* case is no *medium* for *finding out* the intention of the testator; that on the contrary, the rule supposes the intention already discovered, and to be a super-added succession to the heirs general or special of the donee for life; by making such donee the ancestor, *terminus* or *stirps*, from which the whole generation or posterity of heirs is to be accounted; that whether the conveyance has or has not so constituted an estate of freehold, with a succession engrafted upon it, is a *previous question* which ought to be adjusted before the rule is thought of—that to resolve that point, the *ordinary rules for interpreting the language of wills* ought to be resorted to; that when it is once settled, that the donor or testator has used words of inheritance according to their legal import, has applied them *intentionally* to comprise *the whole line of heirs* to the tenant for life; and has really made him the *terminus* or ancestor, by reference to whom, the succession is to be regulated; then comes the proper time to inspect the rule in *Shelley's* case; that then too, it will appear, that being considered, according to those views of policy from which it (as he supposes) originated, it is perfectly immaterial, whether the testator meant to avoid the rule or not; and that to apply it, and to declare the words

of inheritance to be words of limitation, vesting an inheritance in the tenant for life as the ancestor and *terminus* to the heirs, is a mere matter of course. That on the other hand, if it be decided; that the testator or donor did not mean by the words of inheritance after the estate for life, to use such words in their full and proper sense; nor to involve the whole line of heirs to the tenant for life, and include the whole of his inheritable blood, and make him the ancestor or *terminus* for the heirs; but intended to use the word heirs in a limited, restrictive, and untechnical sense, and to point at such individual person, as should be the heir &c. of the tenant for life at his decease; and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs; and constitute him or her the ancestor *terminus* and stock for the succession to take its course from; in every one of these cases the premisses are wanting, upon which only, the rule in *Shelley's* case interposes its authority; and that rule becomes quite extraneous matter.

Butl. Note 1.
Co. Lit. 376.
b.

Mr. *Butler* in a pertinent, instructive note on the subject; states the several points of inquiry, that arise in the discussion of the rule. He says, that if the rule is not of so *very rigid* and forcible a nature as to be uncontroled

trouled by an *express declaration* of the testator, of his intention to give the ancestor an estate for life only, and to give an estate in fee by purchase to the heirs &c. the questions will be; whether any thing short of express declaration will have the effect? and if not, whether the apparent intention, that the ancestor should have an estate for life only, will be sufficient? or whether the intention must also appear, that the heirs &c. should take not as *descendants* but as *purchasers*, and how and for what estates? and how and what estate the heir may take by law, his ancestor taking by the same instrument an estate for life? And after enumerating the three different constructions, of the heirs of the body taking in the usual course of strict settlement on first and other sons successively in tail &c. of the estate vesting in the person first answering the description, in the nature of an absolute purchase transmissible only to the heirs of his own body &c. and that of its vesting in such person so as, on failure of his issue &c. to vest in the person answering the same description, as long as there are any such heirs &c. as in *Mandeville's* case; he observes, that the two first of these modes (from excluding other heirs of the body of the ancestor than the heirs of the body of the first heir) are not reconcileable with the acknowledged general scope of the testator's
inten-

intention; and that if the third was not reconcilable with law, the devise must be left to its legal operation, and the heir must take by *descent*: but if the estates under the third construction were such as the law allows; still there would remain a *formidable objection* to the admission of it; for, by a series of adjudications from the 18th of *Edw. 2.* to 17th *Geo. 2.* inclusively, devises of the nature in question had been construed to vest the inheritance in the ancestor. That admitting therefore, the reason or foundation of the construction to be not now discoverable, there still was great reason to contend that it was binding on the courts.

Mr. *Butler* confines these observations to devises of *legal estates*; and those only which afford no *other* arguments against the admission of the rule than the testator's apparent intention, that the ancestor should take *only for life*, and that the heirs of his body should *take by purchase*: for that where an ulterior intention appeared from any other part of the will, that the inheritance should vest in the person being heir of the body of the tenant for life at his decease, and the *heirs of the body of such person*, and *reach no further*, or should go to the *sons* of the tenant for life successively in tail &c. there was no rule of law or equity that stood in the way of such construction:

construction: It might, Mr. *Butler* observes, be said *that* brought the matter to as much uncertainty as attended it before, but, surely that (he says) was not the case.

Highly as the profession stand indebted to the eminent exertions of the Gentlemen, to whose able and instructive works I have been referring the attention of the reader; and importantly successful as their endeavours have been, in tracing, explaining, and illustrating the foundation, nature, and extent of the rule in question, and in simplifying or facilitating its application, by directing us to the principles that are to regulate and limit it; still, the very subject of that application in the instance of *testamentary dispositions*, seems intrinsically to involve an insuperable *obstacle* to the attainment of *certainty* in the matter: the difficulty, I mean, is the unavoidable reference in some degree and shape or other, to the testator's *intention*.

The application of the rule, is confessedly subjected to the result of an inquiry, to be decided by the ordinary rules for the interpretation of wills; this is in fact, a resort in the first instance to the *discoverable intent* of the testator, which is the leading principle of such interpretation. The difference between the investigation whether the testator *intended* the
rule

rule should apply or not, and the deciding whether he *intended* such a succession as would, in its own nature, abstracted from any view of the testator in the matter, require or attract the application of that rule, falls short of removing the *whole difficulty* attending the construction of a testator's meaning: the shape of the enquiry is indeed changed, its point of aim more determinate, and its course more direct, but the *intention* of the testator is still its object; and it seems absolutely impossible to discharge the application of the rule from this reference to the testator's apparent intention, in respect to his use of the words *heirs &c.* as comprehending or not, the *whole class of heirs* described, without exempting those words from all susceptibility of restriction, qualification or explanation from any other words or expressions in the will. A doctrine which is expressly negatived by those decided cases, in which the admission of the rule has been excluded by restrictive, qualifying, or explanatory expressions.

1 Harg. Law
Tracts 562.
577.

Mr. *Hargrave* indeed, in the observations I have above referred to, expresses himself in terms, which may at first glance, be thought to bear against the leading principle in the construction of wills; when he says, if the party intailing meant to build a succession

sion of heirs on the estate of the tenant for life, he would apply the rule, even though the party should *express in his will* that the rule *should not be applied*, and that the *remainder to the heirs* of the tenant for life *should operate by purchase*.

But upon examination, this appears in effect to be only striking the ballance between two incompatible intentions; the one, that the *whole line of heirs* and those only shall take; the other, that they shall take by *purchase*.

For the succession, it seems, could not be fixed to the line of heirs (*general* at least) of the tenant for life in *that way*. If it vests in the first *heir general by purchase*, it cannot go in succession from him to succeeding heirs of the same ancestor, not being heirs *general* of such first heir, but may eventually go to strangers, either in *defect* or *exclusion* of heirs of such ancestor. For if such ancestor, be the father or *ex parte paternâ* of the heir so taking by purchase, and such heir should leave no heirs *ex parte paternâ*, the succession will be to his heirs *ex parte maternâ*. And if such ancestor should be the mother or *ex parte maternâ* of the heir so taking by purchase, the succession will be to his heirs *ex parte paternâ* in preference of his heirs *ex parte* his said ancestor.

If

If therefore, the intention is once clear, that the succession shall go and be confined to *all the heirs* of tenant for life; the direction that they shall take by *purchase*, must be rejected for inconsistency, in order to fix the effect of the devise to its *intended objects*. This conclusion seems indisputable in limitations to the *heirs general*; but, possibly some doubts may be conceived, in regard to its determined force in limitations to *heirs special*; seeing we have instances of limitations to *heirs special* vesting by *purchase*, subject to a future restrained *course of succession*, through, all the same described heirs of the ancestor referred to, as would have taken by descent from the same ancestor. This was the doctrine in *Mandeville's case*.

Supra, p. 30.

In a limitation to the *right heirs* of *J. S.* without any antecedent limitation to *J. S.* himself, it appears, that to give the estate to his *heir by purchase* would not secure and confine the succession to the whole class of descript *heirs* of *J. S.*; but in case of such a limitation to the heirs of *the body* of *J. S.* we have seen it might.

Supra p. 30.
53.

The impracticability therefore, of preserving the transmission of the estate to the line of *inheritable* succession from the ancestor, if the heir is to take by *purchase*, however incontrovertible in the case of *heirs general*, may be the subject of a little further consideration

consideration in the case of *heirs special*; the result of which, I think, will shew the same conclusion applicable to both.

The instances of a limitation to *heirs special*, vesting by purchase, *so as* to go through the *whole line* of such heirs, can be authorities for the *same mode of succession* only in *analogous* cases; consequently, if the only instances of such a succession are confined to cases where the ancestor takes *no estate* of freehold under the same instrument, they afford us no authority for a succession in *that mode* where the ancestor *does take* an estate of freehold by the same instrument.—Nay, would not that very law which, in cases where the special heir can take only by purchase for want of any estate in the ancestor to connect with the limitation to the heirs, strains so far towards a descent as to support the analogy in succession, and carry it through the same line of heirs under the *pretext* of a descent, would not the same law, I say, avail itself of any estate of freehold in the ancestor, to avoid the *necessity* for such a fiction, and unequivocally avow a genuine perfect descent? The law, it seems, when it allows the course of succession belonging to a descent in cases where all foundation for a *real descent* is wanting, does it only through the fictitious medium of a *supposed* descent; but where is the

call, where the room for any *such resort*, in cases where the foundation of a real descent exists in the freehold taken by the ancestor? The ground for fiction being absolutely precluded, how is the intended succession to be effectuated, but on the subsisting basis of a *real descent*? The *constraint* of resort to a *supposed* descent, where the principle of a real one is denied, appears irreconcilable with the idea of *dispensing with* a real one where such principle exists. The inference, if not encountered by one single judicial decision or opinion to the contrary, seems so direct and strong, that I am at a loss how we are to deny or avoid its conclusive force, on the point in question.

But I am not apprised of any one judicial decision or opinion in support of the *beir's* taking the legal inheritance by *purchase*, where the ancestor takes the *legal freehold* by the same instrument; unless the *succession* is restrained either by an express direction to *heirs* of the *special beir himself*, as in *Archer's* case and others where the word *beir* &c. in the *singular number* is attended with words of limitation, or else by words of limitation super-added to the words *heirs* &c. descriptive of a *different species* of heirs from the first words, as in the case put by *Anderson* 1 Co. 956. In all

Vide infra
141.

all which it is clear the *inheritable succession* is expressly *rescinded* or *prohibited*.

The only cases, I am aware of, wherein the heir has taken the inheritance by *purchase* in such a way as to *preserve the line of inheritable succession*, have been, where the ancestor himself took no estate capable of blending with, or being the basis or inception of the inheritance, as in *Mandeville's* case, and other cases of that sort; which, as I have observed, so far from being *any sort* of authority for the heir's taking in the *same way*, in cases where the ancestor actually *takes an estate of freehold*, affords the strongest ground for a *direct contrary* conclusion; in the forcible stretch of the law in those cases, towards a *descent*, by a fictitious adoption of it in a partial, imperfect degree, where the want of any freehold in the ancestor, excluded the possibility of it in its true and complete state.

Under this view of the matter, may we not fairly rest in the conclusion, that the law will not admit of an *heir special*, any more than an *heir general*, taking the inheritance by *purchase so as to preserve the line of descent from the ancestor* referred to, except in cases where the ancestor, to whose heirs the limitation is directed, takes no *preceding estate of freehold* by the same instrument? If this be so, there

is the same necessity in both cases, for the heirs taking by *descent*, wherever the succession is to pervade the *whole line of heirs* &c. described.

Supra p. 93.

¹ Brown Caf.
Canc. 218.
219.

Our attention is next called to some observations of very high authority, upon the application of the rule I have been treating of. Lord Chancellor *Thurlow* in the case of *Jones v. Morgan* above referred to, laid down some strong featured positions, describing the outlines of a distinction, applicable to all the cases in which that rule had been, or can be agitated. His Lordship drew an inference from all the cases, that, where the estate is so given, that after the limitation *to the first taker*, it is to go to *every person who can claim as heir to the first taker*, the word *heirs* must be words of *limitation*—That *all heirs* taking *as heirs* must take by *descent*. In cases, he said, where he could bring it to the point, that the testator by the word *heirs* meant 1st. 2d. 3d. *and other sons*, there he would *change* the words of the will; but in the case before him, he thought the word *heirs* was the very thing meant.—Suppose, said his Lordship, *William* had had a son, which son had had a son and died, leaving Sir *William* the testator, the eldest son of the son, would have been heir: If there had been a title, he would have taken it; but the estate,

estate, if the words had been words of *purchase*,* must have gone to the second son; the devise to the first son being a lapsed devise, like the case of *White* and *White*; but Sir *William Morgan* meant the estate to go to whoever should be heir. Vide *ibid.* 219 in note.

The Chancellor thought the argument immaterial, that the testator meant the first estate to be an *estate for life*. He took it, that in all cases the testator *did mean so*. He rested it upon what the testator meant afterwards; if he meant that every other person who should be heir should take, he then meant, what the law would not suffer him to give, or the heir to take as a purchaser.—His Lordship said, that in conversing with a great authority, he asked, what would become in the case stated of the grandson; that the Ibid 220.

* Words of *purchase* here, Lord *Thurlow* evidently meant, in the sense of a limitation to first and other sons of *William* successively in tail male, in which case, the devise to the first son being lapsed by his death in the testator's life-time, that to the second son must have taken place, in exclusion of the issue male of the first son according to the case referred to. I have here stated the Chancellor as speaking of the death of a first son of *William* in the life-time of Sir *William* the testator, which, doubtless must have been the intended expression; though the printed report referred to, says life-time of *William*, (who was the first taker) instead of Sir *William* (who was the testator.)

Ibid 221.

answer was, he should take *as heir*. Lord *ThurLOW* observed, he knew he might; but then he must take *by descent*. *All possible heirs*, he said, must take *as heirs*, and not as purchasers; that in all cases where the limitation is of an estate of freehold to a man, and afterwards to his heirs &c. (whether general or special) so as to give it to the heirs as a *denomination or class*, the heirs shall be in *by descent*, and not by purchase. And that the case stated by *Anderson* in *Shelley's case*, of a limitation to the use of *A.* for life, remainder to the use of his heirs, and of their *heirs female*, was the only one to the contrary, and in that case, the words *heirs* must be a description of the persons, in order to let in the limitation to the *heirs female*.

Now, if the inference I have drawn from the very operative tendency of the law to hereditary descent, in its mode of approaching it, where the requisite ground for its perfect accomplishment is wanting, be just; if from such premises, unopposed by any single repugnant decision or judicial opinion, the conclusion that the capacity of an heir to take the inheritance by *purchase*, so as to transmit it through the *same line as by descent*, is confined to *those cases ONLY* where the ancestor *takes no estate* of freehold, be sufficiently founded, Lord *ThurLOW's* doctrine embraces

embraces the subject, to the *full extent* of his expression. For then, *wherever the ancestor takes the freehold*, the inheritance will *not* go to *all the heirs &c.* in the course of inheritable succession, unless by an actual descent. And consequently, if after the first taker, it is to go to *every person* who can claim *as heir to him*, the intended succession can only be effectuated by taking the words heirs &c. as words of *limitation*. If after him *all heirs &c.* are to take *as such*, that is as *answering that description*, they can only take by descent. If the law will not admit of *all possible heirs &c.* taking the inheritance, after its *inception by a freehold in the ancestor*, otherwise than by *descent*, it follows, that wherever the limitation to the heirs &c. after a freehold to the ancestor, is admitted to reach the whole *denomination or class of heirs* described, they must take by descent and not by purchase.

Indeed, if we consider the freehold, what it in truth is, a *portion* of the inheritance; the rule says no more than, that you shall not apportion and divide the inheritance, between the ancestor and a line of successors, claiming under a *denomination* belonging to them, *only* as his *representatives* to an inheritable estate derived *from or under him*.

This delineation of the rule, comprehends two discriminating lines, whose concurrence seems to decide its application; the one is, that the person to claim the inheritance *after the ancestor*, is to claim as *heir &c.* that is, *eo nomine* and under *that description* whoever such person may be; and the other, that the effect of the limitation is not confined to the person so *first* claiming, or *his* representatives *as such* of any description; but directed equally through *all other persons* successively answering the same relative description of *heirship* general or special, to the *ancestor* referred to; and intitling them *eo nomine* or in *that character* only. It is evident, that the first branch of this distinction will exclude all those cases, where the words *heirs of the body &c.* are, by other words of reference or qualification explained or restrained to the sense of *first and other sons &c.* as in *Walker v. Snow—Lisle v. Gray* and others of that description; equally with the cases of marriage articles and executory trusts, wherein a similar construction has prevailed; as well as all those wherein, on account of words subjoined, the persons to take, cannot take as *heirs* or by virtue of that description by reason of the *distributive* direction amongst *several not constituting an heir*, or as *tenants in common* or in some other mode irreconcilable with the course of a descent as in *Doe v. Laming* and others of that sort; together with those where

where the description is directed to a *presumptive heir* in the life-time of the ancestor, as in "*Burchett v. Durdant*" and others of that class. Whilst the latter branch of the distinction, excludes all those cases, wherein the import of the words *heir &c.* in the singular number, is, by annexed words of limitation, confined to the *first, next*, or one *individual heir &c.* and his *heirs &c.* or to such *heir &c.* for life: as in *Cheeke v. Day*, *Archer's case*, *White v. Collins* and others of like complexion; as well as those where the words of limitation superadded to the words *heirs &c.* denote a different species of *heirs* from that described by the first words: as in the case put by *Anderson* in *Shelley's case*. At the same time, that it admits all those cases, where, though the testator inserts trustees to support contingent remainders, as in *Papillon v. Voice*, *Coulson v. Coulson*, *Sayer v. Masterman*, *Wright v. Pearson*, *Perryn v. Blake*, *Ambrose v. Hodgson & Ux.* and *Jones v. Morgan*, or even proceeds to impose a restriction against alienation, as in *Leonard v. Earl of Suffex* (supposing it had been an estate *executed*) *Perryn v. Blake* and *Thong v. Bedford*, or to restrain the successive heirs &c. to estates for life, as in *Hayes v. Foorde*; yet he does not fix on, or stop at any *particular heir &c.* and *his heirs &c.* nor point at a strict settlement, on first and other sons; but appears to have the *whole*

line of heirs &c. equally in the extent of his contemplation ; and only attempts to restrain the interests or powers of the first taker, or any of his heirs, to limits, by law incompatible with the *directed* and intended *succession* through the *whole class of heirs* &c.—A detailed application of this distinction, to all the particular cases, would be too prolix for this place. I shall, therefore, leave it to the industry of the reader ; who, if sufficiently interested to make the experiment, will, I am confident, find ample recompence for his pains, in the success of it.

The above distinction agrees in effect with, and brings us to the same conclusion, in respect to the application of the rule, as the principles laid down in more general terms by Mr. *Hargrave* ; a concurrence to which that gentleman alludes, when he says (in the observations above referred to) that *his* notions, about the rule in question, substantially appear in great measure to accord with *those* attributed to a *living judge* of equity of the first rank and distinction. That at least, it might be collected from the printed report of his judgment in the great case of *Jones v. Morgan*, in its latter stage, that his general impressions of the rule were not unsimilar to those, which it was his (Mr. *Hargrave's*) intention,

1 Harg. Law
Tract 555.

tention to state and insist upon in a more particular manner.

Mr. *Hargrave's* observation, that where it is once settled that the donor or testator applied the words *intentionally* to comprize the whole line of heirs to the tenant for life, the rule *must apply of course*, supposes the concurrence of those lines of distinction, which are contained in Lord *Thurlow's* positions, to exist in the case falling under that predicament. But a direct application of *those lines themselves* seems to afford us a fair medium for settling the testator's presumable intention, in his use of the words heirs &c.; and to reduce the inquiry, respecting the admission of the rule, to two simple questions; viz. Is the limitation to the *heirs &c.* so calculated and directed, that the person claiming under it, must intitle himself merely under the *description of heir* of the species denoted by the words in their technical sense? And if so, is there any thing to restrain the same words from equally extending to, and comprehending *all other persons* successively answering *the same description*, or from intitling them alike *under it* and *eo nomine* only? A negative answer to either branch of this enquiry, seems to exclude the application of the rule; whilst an affirmative one *to both*, will, according to the grounds I have been endeavouring

deavouring to explain, bring the case directly within it.

And if such an affirmative resolution of this inquiry, be allowed, (as I think it fairly may) a sufficient criterion of the testator's intention to comprise the whole line of *heirs &c.* of the first taker; then, it affords us that answer to the previous question referred to by Mr. *Hargrave*, which immediately opens the door to the rule, upon the principles laid down by that gentleman.

Under such a coincidence of authorities, bearing to the same conclusion, we might, perhaps, be justified in referring the application of the rule in *Shelley's* case, to the test of the inquiry I have stated; without further solicitude about the testator's *possible* or *problematical* intention; which, those who have been most conversant in preparing or settling wills, too well know is frequently inexplicable by a testator himself, even on points not in the least implicated with technical learning; but, upon technical questions, such as that respecting the rule in *Shelley's* case, how are we to ascribe *any intention at all* to the testator, that such rule *should* be *rejected* or *admitted*? Can a testator be supposed to entertain *any meaning*, in regard to a rule, to which he is a perfect stranger? A subject,
which

which never entered, or could enter his contemplation; a point of which he never had any conception or idea at all?

The question in its true shape is, whether the *dispositions* which the testator appears to have *intended* are incompatible or not, with the admission of the rule. And the resolution of this question, if left to the result of that enquiry, to which I have endeavoured to refer the admission or exclusion of the rule in *Shelley's* case, will never, I believe, be found much at variance, with the presumable scope of the testator's general intention; notwithstanding his having, *in expression*, confined the first taker to an *estate for life*.

If the testator meant, according to the terms of the proposition, that the person who should take after the tenant for life, should be *any person* indiscriminately *answering the description of heir &c.* of such first taker, and entitled *only in respect* of such description; and that *all other persons* successively succeeding to the *same description* should *eo nomine*, and by virtue *only of such relation* to the ancestor, *equally* succeed to the estate; it follows, that he could not have any particular *object* of attention among all this *unknown class of successors*; much less any preference of *any one* of them,

them, to that *stock or source* from which his bounty reaches them, only by emanation as it were.

The disposition, in its progress to *heirs &c.* at large, is only a modified extension of the gift to the ancestor; the immediate and sole known object of the testator's favour, in relation to whom alone the *eventual* ulterior takers can bring themselves within the *track* of his notice: What ground have we then to ascribe to the testator, any impulse of distinction, among such equally unascertained accessory objects of his view? What pretence for inferring any such preference of any one individual of them, to the rest, and even to the ancestor himself; as to intrust that *one* with a power of defeating the succession to *all the rest*, whilst it is denied to their common ancestor?

Unless we have some apparent grounds for presuming a distinction in the testator's mind, between the person *first* happening to answer the general description, and any one succeeding to the same place; it is fair to suppose the testator meant, that the succession should go *equally secured*, to the *whole description* line of takers, under one and the same *general reference to the same ancestor*. But this meaning, would be as substantially violated,

lated by investing the *first* fortuitous heir, with the power of defeating the succession to the *whole sequel train*, as by investing the ancestor himself with such power; except that the first heir himself would, in the latter case, be equally subjected to it with all the rest, And why not, if the testator has not distinguished that *first* from the *rest*, nor of consequence preferred *him* to the *ancestor*?

The law imposes the dilemma of committing such power either to the *ancestor* or his next *heir*: will any reasonable inference of the testator's *intention* in the matter, induce the preference of an unknown derivative character, *accidentally* meeting the terms of a *general description*, to the original attractive object, the groundwork of the testator's bounty, and to which the attendant relative designations seem mere appendages? If not, there is no more apparent violence offered to the testator's presumable intention, by vesting the inheritance *in the ancestor*, than in his *first heir*, wherever that heir is not distinguished from the rest, but all heirs of the description used, appear to be equally in his contemplation.

After all, we are constrained to admit, that whatever have been, or, may be the attempts to reduce the rule in *Sbelley's* case, to
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one indisputable line of application, in testamentary dispositions; it will ever remain impossible to deliver the subject from that difficulty, which in some instances, must leave our conclusions a-float, respecting the existence of those *premises*, on which the application is made to depend, *viz.* the testator's intent *equally to include the whole line or denomination* of heirs expressed. This will happen, wherever inconsistent expressions or dispositions in the will, suspend the militating arguments of intention, nearly in equilibrio. But such cases, I think, must be few, in comparison of the great majority, wherein the answer to that inquiry to which I have considered the application of the rule immediately referable, will be pretty readily and satisfactorily decided. And if so, the principles afforded us by the several authorities I have referred to, and of which, I have endeavoured to shew the general convergency into one common focus of operation; may justly be allowed, to have furnished us with some steady lines, for directing the application of the rule in most cases of common occurrence; and which reduce the difficulty to little more, than what accidentally attends, and must attend, the application of every rule of law or construction; upon which our conclusions will occasionally feel some sort of vibration, between the impulses of incongru-

ent circumstances, of which the preponderancy is scarcely ascertainable.

Having now discharged that degree of attention to the much agitated rule in *Shelley's* case; which, I imagined, would be neither wholly unacceptable, nor useless, to those whose concerns interested them in the subjects of this treatise; I shall next proceed to notice the second class of cases, which are exceptions to the last of the four descriptions of contingent remainders above given. These are grounded upon that respect and attention which (within certain bounds, and where it contravenes no rule of law) is paid to the intent of a testator, wherever it can be collected from any particular expressions in his will. I mean the cases wherein a limitation in a devise to the heir *special* of a person living, has been adjudged a *descriptio personæ*, or sufficient designation of the person for the remainder to *vest*, notwithstanding the general rule that *nemo est hæres viventis*. But these cases have been, either, where the limitation to the heir *special* has been qualified by the words *now living*, or some other circumstances have appeared in the will, to manifest the testator's intention, that the estate should *vest*.

(144)

As where *A.* devised land to *J. S.* and his heirs, during the life only of *B.* upon trust
to

Burchett v.
Durdant.
3 Ventr. 311.
Cart. 154.
And vide
supra 114.

T. Jo. 99.
1 Vent. 334.
2 Lev. 232.
Raym. 330.
James v.
Richardson.
Vide Brown's
Cases in
Parl. v. 1.
P. 493-

2 Salk. 679.
Vide supra,
116.

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Long v.
Beaumont.
1 P. W. 229.
1 Eq. Abr.
114.
2 Eq. Abr.
331.

to permit and suffer *B.* during his life to receive the profits, he committing no waste, and after the decease of *B.* then to the heirs-male of the body of *B. now living*, and to such other heirs-male or female as he thereafter should happen to have of his body; *B.* had issue *C.* a son *then living*. The court of King's-Bench adjudged that *B.* took a *trust-estate* for life, and that the remainder in tail vested in *C.* immediately, and was not contingent; for that the words *now living* made the limitation a sufficient designation of the person; and this judgment was afterwards affirmed in the House of Lords. A like judgment had before been given in the court of King's Bench in another case on the same will, on the very same point; which judgment was reversed in the Exchequer-chamber, and that reversal again reversed in the House of Lords, as appears in the reports cited in the margin. It is to be observed, that Chief Justice *Holt* afterwards in the case of *Broughton* and *Langley* denied the case of *Burchett* and *Durdant* to be law, in regard to the *use* not being *executed* in *B.*

Again, where there was a devise to trustees for the term of twenty-one years for the payment of debts and legacies, remainder to testator's first son in tail-male, remainder to the heirs-male of the testator's body, and for default of such issue to *J. S.* for ninety-nine years,

years, if he should so long live, remainder to his first and other sons successively in tail-male, remainder to the *heirs-male* of the body of the testator's aunt *E. L.* lawfully begotten, and for *default of such issue* the reversion and remainder to the testator's right heirs. The testator gave a legacy to his said aunt *E. L.* thereby taking notice that she was *then living*, he also took notice of her having three sons, to whom he gave a legacy; he also gave *his heir at law* an annuity out of the lands and legacies to her children. The testator died without issue, and so did *J. S.* and the question was, whether the eldest son of *E. L.* (the said *E. L.* being living at the testator's death) or the heir at law of the testator was intitled to the land.

Begotten and to be begotten generally bear the same construction. Vide Co. Lit. 20.b. 2 Vern. 545. 711. Prec. in Canc. 491. 2 P. Wms. 457. 2 Ibid. 33.

It was insisted on the part of the heir at law, that the devise to the *heirs-male* of the body of *E. L.* was a contingent remainder, and consequently void, because there was no preceding vested freehold to support it; that it could not operate as a devise to the eldest son by way of *designatio personæ*, he not answering the description of heir-male of the body of his mother at the testator's decease, because *nemo est hæres viventis*. But it was adjudged in the court of Exchequer, that he was intitled under the devise in question;

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for that he was the person designed by the appellation of *beir-male* of the body of *E. L.*

The court held, that though in the strictest legal sense of the word *beir*, the eldest son of *E. L.* could not be *beir-male* of her body during her life ; yet the word *beir* had another more general sense, in which it was used for *beir-apparent* ; in which sense it was applicable to him at the time of the testator's decease ; that the testator had taken notice, that his aunt *E. L.* was living, and that she had three sons ; he therefore could not mean, that the eldest son should take *strictly* as *beir*, but as *beir-apparent* he might. Besides, he took notice of his own heir, and gave her an annuity out of the lands ; which shewed his intention, that she should not have all the lands ; and the limitation to his own right heirs was expressly in *default of issue-male of the body* of his aunt *E. L.* ; so that it was plain he intended the apparent heir-male of *E. L.* should take before his own heir general ; and that his own heir should not take whilst there was any issue of *E. L.* ; and that this was like the case of *Burchett* and *Durdant*, since there could be no great difference between heirs-male of the body of *B.* then living, and heirs-male of the body of the testator's aunt lawfully *begotten*, the word
begotten

Vide supra,
145 in margin.

begotten being tantamount to the words *then living*. This judgment was afterwards reversed in the Exchequer-chamber, and that reversal again reversed in the House of Lords.

Vide Brown's
Cases in
Parl. v. 1.
p. 489.

So, where a testator after charging the lands with annuities to his wife, and after her decease to four of his five daughters, and another annuity to his fifth daughter *M.* for seventy years if she and the testator's son *R.* should so long jointly live, to commence at the expiration of the term of two years thereafter given in the premises to the said *M.* and the death of testator's wife; and after devising the premises to his said daughter *M.* for two years after his decease, with remainder to his son *R.* (if then living) for ninety years, if he so long lived; he devised the premises so subject, to *R.*'s *heirs-male* and to the *heirs of his daughter M.* jointly and equally, and *their heirs and assigns for ever*. And for want of heirs male lawfully begotten of the said *R.* at the time of his decease, he devised the premises to the *heirs and assigns of the said M. lawfully begotten of her body*, to hold to the heirs and assigns of the said *M.* for ever. The son *R.* at the time of the will, had *one* son and two daughters; and the daughter *M.* had then one son.

Goodright
v. White.
2 Black.
Rep. 1010.

On the testator's death, *M.* entered, and held the whole of the lands for the two years; when the son *R.* entered and held them till his death, upon which, *M.* entering, the son of *R.* brought his ejectment.

Upon the case being argued in the court of *C. B. De Grey*, *C. J.* said, the question was, whether there was a sufficient *designation* of the person to make the *son* of *M.* take as her *heir* living the mother; that two hundred years ago it might have been thought not sufficient, because the description was not legally and *technically* true. But that, within a century past, a more liberal construction of the words of a testator had prevailed; and they had been generally taken in their *popular* sense, which was most likely to have been his meaning. That in the principal case, the intent of the testator was clear, that the same favour should be extended to the heirs of *M.* as to the heir male of *R.*; he took notice that *M.* was *living* by leaving her a term, and a subsequent annuity; and meant a *present* interest should vest in her heir, that is her *heir apparent* during *her life*; he therefore did not think the lessor of the plaintiff was intitled to more than one moiety of the premises.—The rest of the justices agreed in the same opinion, and the plaintiff had judgment as to one moiety only.

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We may observe, however, that there was not one of the last noticed class of cases, in which the ancestor took the legal estate of freehold.

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Those cases only operated by way of exception to the rule, that *nemo est hæres viventis*; and consequently made that a *vested* limitation which, otherwise would, according to that maxim, have been *contingent*.

Vide Chalonier v. Bowyer.
2 Leon. 70.

There is another class of cases, which are sometimes, and for some points, blended with those I have last noticed; but they may be considered as only relative, by way of exception, to the doctrine respecting the necessary completion of the full description in a special heir to take by purchase, laid down by Lord Coke 1 Inst. 246. and pursued in *Couden v. Clerk*, Moor 860. Hob. 29. Jenk. Cent. 294. and several other cases referred to below.* A leading case of the class I am now advertising to, as exceptions to the doctrine of Lord Coke, is that of *Brown v. Barkham* where

* Ashenhurst and Curtis cited Hob. 34. Palm. 50. Southcot and Stowell supra p. 32. Starling and Elrich Prec. Canc. 54. Ford and Lord Ossulston Vin. Abr. Devise U. c. p. 2. in margin. Dawes and Ferrars 2 P. Wms. 1 Prec. Can. 54. Vin. Ab. Devise W. 6. note on pl. 3.

Brown v.
Barkham.
2 Vern. 729.
Prec. in Canc.
442. 461.
Gilb. Rep.
116. 131.
And 1 Stra.
35.

Vide Supra
33.

upon a devise to trustees and their heirs, in trust to sell a sufficient part for payment of debts and legacies, and after payment thereof to convey the residue to *R.* and the heirs males of his body, and for want of such heirs males to the *heirs males* of the body of *B.* (the testator's great-grandfather,) and for want of such heirs male, to his own right heirs for ever; it was held by Lord Cowper, that the words of the will were sufficient to vest the estate in *E.* a cousin of the testator, who was *heir male of the body* of the great-grandfather to have taken by descent, though not at the same time *heir general*, there being a daughter of an elder brother of *E.*'s father, who was *heir general* of *B.* There are other cases of the same description referred to below: * to which I may add, that of *Wills v. Palmer* stated in a former page of this treatise: But cases of this description do not immediately relate to the doctrine of contingent remainders: For the question, in them is not whether certain circumstances may take a limitation to the *heirs &c.* out of the general rule, that *nemo est hæres viventis*, and occasion the estate to vest in the *heir-appa-*

* Vide case cited by Hale 1 Ventr. 381. Bowman and Yates Canc. Case 145. Hale's Opinion in Pybus v. Mitford 1 Ventr. 372. 1 Freem. 351. 369. 2 Lev. 75. Wall v. Baker. 1 Stra. 41.

rent, under such description instead of being a *contingent remainder* as in the cases I have before cited: but the point agitated in the last mentioned cases, respects the extent of the general rule, that a person, in order to take by *purchase*, under the description of *beir special*, must answer *both parts* of that description, by being actually *beir*, as well as that *species of beir* denoted by the description, according to Lord Coke's doctrine, above referred to. I have therefore no occasion to enter into a detail of those cases here; but for the satisfaction of those who wish to see a clear and judicious discussion of the principles and doctrine drawn into question in them, I cannot do better, than refer to the learned and ingenious note of Mr. *Hargrave*, in the last edition of Lord Coke's first Institute; where in note 3. fo. 24. *b.* the doctrine laid down by Lord Coke, its principles and distinctions, and the several authorities and cases relative to it, are considered and explained with great accuracy and judgment; and where the reader is also presented with a note of Lord *Hardwicke's* opinion, upon his affirming the decree of Lord *Cowper* in the said case of *Newcomen v. Barkham*.

And vide
Harg. note 2.
Co. Lit. 164.
a.

Having sufficiently noticed the general exceptions, to the literal extent of the four descriptions I have above given of contingent

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remain-

(148) remainders; it may be proper to explain the distinction betwixt that kind of uncertainty which makes a remainder *contingent*, and an uncertainty of a different kind which appears to have been sometimes confounded with it; I mean the uncertainty of a remainder's ever taking effect in *possession*; a distinction not always attended to, but absolutely requisite to complete an accurate notion of what is in law considered as a *contingent* estate. For wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse* and *ascertained*; in that case, notwithstanding the nature and duration of the estate limited in remainder may be such, as that it may not endure beyond the particular estate, and may therefore never take effect or vest in *possession*, yet is it not a *contingent*, but a *vested* remainder. As if a lease be to *A.* for life, remainder to *B.* for life or in tail, here, notwithstanding *B.* may possibly die or die without issue in the lifetime of *A.* and consequently never come into possession, yet is his remainder *vested in interest*, and by no means comprised in the legal notion of a *contingent* estate,

It is not the *uncertainty* of ever taking effect in *possession*, that makes a remainder *contingent*;

tingent; for to that, every remainder for life or in tail is and must be liable; as the remainder-man may die, or die without issue before the death of the tenant for life. The *present capacity* of taking effect in *possession*, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a *vested* remainder from one that is *contingent*.

For instance; if there be a lease for life to *A.* remainder to *B.* for life, here the remainder to *B.* although it may possibly never take effect in *possession*, because *B.* may die before *A.* yet, from the very instant of its limitation, it is *capable* of taking effect in possession, if the possession were to fall by the death of *A.* it is therefore *vested in interest*, though perhaps the interest so vested, may determine by *B.*'s death, before the possession he waits for may become vacant.

On the other hand, if there be a lease for life to *A.* and after the death of *J. D.* remainder to *B.* in tail; in that case the remainder to *B.* is not *capable* of taking effect in possession during the life of *J. D.* although the possession should fall by the determination of *A.*'s estate: but if *J. D.* chance to
die

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die before the determination of the particular estate, then does *B.*'s remainder by such event become *capable* of taking effect in *possession* when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of *J. D.* This very essential alteration in the nature of *B.*'s remainder, occasioned by the timely event of *J. D.*'s death, is the *change* of a *contingent*, into a *vested* estate; before that event it had not the *capacity* of vesting in possession, and it was doubtful whether it ever would have it or not; it was therefore not vested at all: by that event it acquires the *capacity* of vesting in *possession*, when the *possession* becomes vacant; it is therefore vested in *interest*, though it is yet uncertain whether it ever will vest in *possession*; for it is still possible, that *B.* may die without issue during the continuance of the particular estate.

In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person *in esse*, and *ascertained*, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder; such remainder is *vested*. On the

the contrary, wherever the preceding estate (except in the instances before noticed, as exceptions to the descriptions of a contingent remainder) is limited, so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse* or not ascertained; or wherever it is limited so as to require the concurrence of some *dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder*, to give it a capacity of taking effect; then the remainder is *contingent*.

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I am the more particular on this point, from a desire of preventing the errors, which must affect our conclusions upon questions of law concerning this subject, if the *uncertainty of taking effect in possession*, should form any part of our notion of a *contingent remainder*: such a principle would scarcely fail to mislead us in every case of the least doubt. Suppose a lease be to *A.* for life, remainder to *B.* during the life of *A.* and the question to be put, whether this remainder to *B.* be a *vested* or a *contingent* interest? Upon the principle last mentioned, this remainder, which would be absolutely void were it not for the possibility of its taking effect by the forfeiture or surrender of *A.*

must

Vide Duncomb v. Duncomb. infra 271.

must necessarily be deemed contingent; because such forfeiture or surrender, upon which its taking effect in possession entirely depends, are *doubtful uncertain* events, which probably may never happen. There are instances of this sort of argument for considering such remainders as contingent.

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Moor 344.
1 Saund. 151.
3 Lev. 437.
Duncomb v. Duncomb, cited infra. p. 271.

Now, it is very true, such a remainder as I have last instanced, may never take effect *in possession*: it depends on a *dubious uncertain* event whether it shall or not, nay the probability is against it; yet, certain it is, there are not wanting cases enough in our books to prove such a remainder to be a *vested* interest. But this is not the only instance wherein the same principle would lead us into mistakes; it would carry us much farther, and prove many other remainders to be *contingent*, which have ever been undoubtedly considered, as perfectly *vested* in interest as any remainders whatsoever.

If we examine the same case by the distinctions I have laid down, we shall find it fall clearly under the description of a *vested* remainder; for here is a preceding estate to determine on an event which certainly must happen, (*viz.* the death of *A.*) and the remainder is so limited to a person *in esse*, that the

the preceding estate may by some means (*viz.* by forfeiture or surrender) determine before the expiration of the estate limited in remainder, *i. e.* before the expiration of *A.*'s life; accordingly, if *A.*'s life be not expired at the determination of the particular estate, which it will not, if *A.* should commit a forfeiture, or make a surrender, then will the remainder take effect in *possession*: therefore it comes expressly within the terms of the foregoing description of a *vested* remainder; and as this conclusion corresponds with the authorities in point, it may fairly be considered as an instance of the justness of that distinction from which we can thus immediately derive it.

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I am very well apprized that Lord Chief Justice *Lee*, in his argument in the case of *Smith*, on the demise of *Dormer v. Packhurst et al.* as reported by *Viner*, seems to state the same case as an instance of one sort of *contingent* remainders, in the words following: "2dly, Where the particular estate may determine before the remainder can commence, as an estate to *A.* for life, and from and after the determination of his estate, then to *B.* during the life of *A.* this is good by *contingency*, that is if *A.* forfeit his estate by alienation or otherwise, in his lifetime." This passage I formerly observed

Vol. 4.
p. 306 in
margin.

to have been cited, in a note under the definition of a contingent remainder, in *Bacon's Abridgment*; and thereupon expressed my wish that its force had been duly weighed before it had been offered to the reader in that detached form, which must necessarily mislead him. But I find it has been since very properly omitted by the judicious Editor of the fourth improved edition of that valuable book.

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The quotation was taken from *Viner's* report of the argument at large, and when so detached nothing appears to control or invalidate its authority: But when connected with the sequel of the same argument, its force vanishes under the clearest evidence of some mistake or inaccuracy of expression in the words so quoted: To be satisfied of this we have only to read the following passage, which occurs a few lines lower in the same argument: "As a lease to *A.* for life, remainder to another during the life of *A.* this is good, because by possibility the remainder may take effect, by the tenant for life's alienating or committing a forfeiture; this possibility is therefore considered as an *interest in the grantor*, which he may limit, and is that sort of interest which the trustees have for preserving contingent uses, and is not a mere right of entry, nor
" a con-

"a contingent remainder but a VESTED ESTATE,
"to take effect by those ways and methods
"of determination to which the particular
"estate was subject when it was created."

This last passage goes directly to the point, and is conclusive: it expressly states the very same case, and affirms, that such remainder is *not a contingent* but a *vested* estate, to prove which several authorities are there cited; for all which I refer the reader to the argument itself. Agreeable to this idea was the judgment given in that case, so far as it respects the point I am now considering; which judgment was afterwards affirmed in the House of Lords. It is evident, therefore, the first cited passage must be erroneous; and as such I should have passed it over without notice, had I not apprehended it might have been mistaken for an authority, by those who should meet with it detached from the case at large.

Brown's Caf.
Parl. v. 4.
p. 405.
and Vide
Butl. note
2 Co. Lit.
265. a.

The above cited case of *Smith* on the demise of *Dormer v. Packhurst et al'* was a limitation in remainder (after several preceding estates for life and in tail) to the use of *A. for 99 years if he should so long live*, and from and after the death of *A. or other sooner determination of the estate limited to him for 99 years*, to the use of trustees and their heirs during the

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Dormer v.
Packhurst,
Vin. vol. 18.
fol 413.
3 Atk. 135.
Brown's Caf.
Parl. v. 4.
p. 353. and
405.

the life of the said *A.* upon trust to preserve contingent estates &c. and for that purpose to make entries and bring actions &c. but to permit the said *A.* to receive the rents and profits &c. during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of *A.* successively in tail-male, with divers remainders over. By the expiration of all the preceding estates, *A.* came into possession of the estate limited to him for 99 years; and having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards *A.* died without leaving any other son; the next surviving remainder-man made his actual entry within five years, and the question was, Whether the recovery had barred his remainder?

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This point depended entirely on another question, Whether the *freehold* was in the trustees *during the life of A.* or not? For if it was, the recovery was not well suffered for want of a good tenant to the *præcipe*, and consequently did not bar the remainder; but if the trustees had not the *freehold*, then it was in the son, and of course he was capable of making a good tenant to the *præcipe*, and the

the recovery in that case was well suffered; for the court held that the fine by lessee for years (*A.*) or the reversioner (the son), could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not acquire the freehold as a feoffment would have done.

To prove that the freehold was not in the trustees, it was insisted, 1st, That the remainder to the trustees was *void* in its creation, because to commence *after A.'s death*, and then hold *during his life*, which was repugnant, and could never take effect at all: 2^{dly}, If not void in its creation, it was a *contingent* remainder, because it was uncertain whether it ever would take effect, as the term of 99 years might not determine in *A.'s* life-time. 3^{dly}, That if it was neither void nor contingent, yet it did not amount to a *legal estate*, but was only a *right of entry*.

But the court resolved, that the remainder was *not void* in its creation, its commencement not being restrained to the death of *A.* but limited from the death of *A.* or other sooner determination of the estate for 99 years, and therefore might take effect by surrender, forfeiture, or effluxion of time, in *A.'s* life-time. 2^{dly}, That it was not a *contingent* remainder, being limited to persons *in esse*,

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without any condition precedent to be performed; it did not depend on the death of *A.* but on such other events, (*viz.* forfeiture, surrender, &c.) as might determine the particular estate from the *nature of the estate itself*. 3dly, That it was not a *mere right of entry*, but a *legal estate*, for that a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate. Therefore the trustees had the *freehold* for the life of *A.* And, upon the whole, the court held that the fine and recovery did not bar the remainder. It is to be observed, that this very case, so far as respects the question, whether the remainder to the trustees was *contingent* or not, falls directly within the distinctions I have above laid down, and is capable of being resolved by them in the same manner, and with the same facility as the case I have before instanced.

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1 Rep. 137.
Chudleigh's
case.

It frequently happens, that contingent remainders intervene between the particular estate and other limitations over; upon which cases we must observe, that wherever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be *vested*, if it be made to a person *in esse*. As upon a feoffment to the use of feoffees during the life of *A.* and after his death,

death, to the use of his first and other sons successively in tail; with several remainders over; and *A.* having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not *in esse* were *contingent*, but the uses to persons *in esse* were *vested* immediately; and that the *contingent* uses when they should come *in esse*, would vest by interposition, if the estate for life, which ought to support them, was not disturbed.

Where, in the *same conveyance*, an estate for life is limited to a person, and after that a contingent remainder to another, followed by a remainder to the *beirs* or *beirs special* of the first tenant for life; this last limitation shall be esteemed executed only *sub modo*; that is, in such manner as to open and separate itself from the first estate for life, when the contingency happens.

11 Rep. 8c.
Lewis
Bowles's case
supra 28.

The preceding cases are instances, where the *contingency* of the intervening remainders, arose from their being limited to persons not *in esse*. But if there be a remainder limited to a person *in esse*, so as to depend on a contingent event, if the same contingency be not considered as extending to the subsequent limitations, such of those *limitations* as are to persons *in esse* may be *vested*; as in the case

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Vide supra,
p. 12.

And vide
Tracey v.
Lethulier,
infra. p. 161.

of *Napper v. Sanders* above cited; where, upon a feoffment made by *A.* to the use of himself for life, and after to the use of the feoffees for 80 years, if *B.* and *C.* his wife should so long live; and if *C.* survived *B.* her husband, then to the use of her for life, and after her decease to the use of *D.* in tail, remainder over; though it was agreed that *C.*'s estate for life was *contingent*, on the event of her surviving her husband, yet it was held that the subsequent remainders were *vested*.

Whitfield v.
Bewit.
2 P. W. 240.

So where lands were conveyed to the use of the grantor for life, remainder to *A.* for life, remainder to his first and other sons in tail-male successively, like remainders to *B.* and to his first and other sons, remainder to *C.* and *D.* (the grantor's sisters) and the heirs of their bodies, reversion to the grantor in fee; after the grantor's death *A.* and *B.* having no sons and *C.* being dead without issue, *A.* cut down timber-trees and sold them; the heir of the grantor, as then seised of the first estate of inheritance in one moiety of the lands, filed his bill for an account of one moiety of the timber-trees; and though it was objected, that it was more agreeable to equity, that the value of the timber-trees should be put out for the benefit of the sons of *A.* and *B.* which might be born; yet Lord *Macclesfield* held, that the heir of the grantor *as seised* of the first estate of inheritance in a moiety at the time of felling

selling the trees, was intitled to a moiety of the timber; and Lord Chancellor King was of the same opinion upon a rehearing.

So a subsequent contingent remainder may become *vested in interest* before a preceding one, which will be no obstruction to its so vesting. As where *A.* was tenant for life, remainder to his first and other sons in tail-male successively, remainder to *B.* for life, remainder to his first and other sons in tail-male; then *B.* having issue a son, and *A.* no son, *A.* cut timber-trees; it was adjudged, that the son of *B.* who was then tenant in tail, should have them, for the property thereof was in him by reason of his inheritance, and the remainder to the first and other sons of *A.* was no impediment, being but a *possibility* which might never happen.—But here it is to be observed, that Chancery will not admit of waste by *collusion* between tenant for life and the person intitled to the first *vested* estate of inheritance, to the prejudice of persons not *in esse*; any more than it will permit tenant for life, having the first vested inheritance in himself, to take advantage of it, in committing waste, to the prejudice of intermediate contingent remainder-men.

2 Roll. Abr.
111. Uvedale
v. Uvedale.

Vide Garth
v. Sir John
Hind Cotton.
And Williams
v. Duke of
Bolton infra.
450.

But where there is a contingent limitation *in fee* absolute, no estate limited afterwards

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Loddington
v. Kime.
1 Salk. 224.
Lord Raym.
208.

And vide
Beck's case,
infra. p. 276.

Doe v.
Holmes.
Goodright v.
Dunham and
Doe v.
Perry, in-
fra. 29, and
Ives v. Legg
infra. 266.

See my opinion on Whitaker will 19. Nov. 1806.

can be *vested*. As a devise to *A.* for life, without impeachment of waste, and if he have issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to *B.* and his heirs for ever; in that case the court held that the remainder to *B.* and his heirs was not vested, because the precedent limitation to the issue of *A.* was resolved to be a *contingent fee*; and they took the distinction I have stated; that where the mean estates limited are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest; but that no remainder after a limitation *in fee* can be *vested*. This doctrine is established by other cases noticed in the sequel of this essay, and here referred to in the margin.

It seems, however, that a contingent *determinable fee*, devised in trust for some special purposes only, will not prevent a subsequent limitation to one *in esse* from being *vested*. As where *A.* devised lands to his daughter for life, remainder to trustees to support contingent remainders, remainder to her first and other sons successively in tail; and if his daughter should depart this life without issue of her body *living at her death*, then he devised the lands to *trustees and their heirs* until his cousin *N.* should attain his age of twenty-one years, upon certain trusts &c. *Item*, he gave and devised the lands to his cousin *N.*
after

Tracey v.
Lethulier.
3 Atk. 774.
Ambl. Rep.
204.

after he should have attained his age of twenty-one years for the term of his life, remainder to trustees to support contingent remainders, remainder to the first and other sons of *N.* successively in tail &c. and in default of such issue, or in case *N.* should die before twenty-one and without issue, remainder over. Lord *Hardwicke* held, that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees until *N.* should attain twenty one; that this limitation to trustees was not an *absolute fee*, as was contended, but a *determinable fee*; that the estate limited to *N.* was only contingent until he should attain twenty-one; and that this contingency extended to none of the subsequent estates, and therefore the remainders over to persons *in esse* were *vested*.

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It frequently happens that estates are subjected to a power of appointment in the first taker &c. with remainders over *in default of such appointment*. Upon which, an opinion has obtained in some instances, that such a power suspended the effect of the subsequent limitations, and kept them in *contingency*, instead of their *vesting* subject to be *divested* by a subsequent execution of the power. The opinion of the Chief Justice on the second point in *Leonard Lovie's* case, as well as that of Lord *Hardwicke* in the case of Sir

10 Co. Rep.
85.

Walpole v.
Lord Con-
way.

Barnard.

Canc. Rep.

153.

Was a limitation to children in tail, in default of appointment by the father, under a power of limiting any estates to any of them he pleased, and therefore held *contingent*, during his life.

Cunningham
v. Moody.

1 Vez. 174.

Robert Walpole v. Lord Conway were to this effect. But these have been over-ruled by later determinations: and indeed that of Lord *Hardwicke*, in the last mentioned case, being expressly founded on the decision in *Loddington v. Kime*, was no further an authority, than the doctrine in that case on which it was grounded, bore it out. But I rather think the doctrine in *Loddington v. Kime*, did not go the length of the opinion in *Walpole v. Lord Conway*, as I shall observe by and by: and we accordingly find Lord *Hardwicke* making a different decision in a subsequent and more mature case.

Thus, where by marriage articles, money was agreed to be laid out in the purchase of lands to the use of the husband for life, remainder to trustees during his life, to preserve &c. then to the wife for life; then to all and every child or children to be begotten by the husband on her body, for such estate &c. proportion &c. as the husband and wife during their joint lives, by any writing under hand and seal and attested &c. should appoint; in default of a joint appointment, then as the survivor should appoint; and in default of appointment to be equally divided among the children, if more than one as tenants in common, with cross remainders and benefit of survivorship; if but one, then to that child

in tail, in default of such issue to the husband his heirs and assigns for ever.

Upon a question, whether the *inheritance* in the lands to be purchased, would have vested in the father, it was contended it could not; because during his whole life, the inheritance, supposing a purchase made, would have been in *abeyance*; for as he might have limited it to any child *in fee*, and the provision over in default of appointment would then have been out of the question, it was a springing use, resting in suspense during his life; for which Lord *Conway's* case was referred to.

But Lord *Hardwicke* held, that the father taking an estate for life by the *same settlement*, the inheritance would have vested in him. He said, that where no person was seen or known in whom the inheritance could vest, it might be in *abeyance*—that the fee's being in *abeyance*, had in some cases occasioned an act of parliament to remedy it; but there it was *not so*: nor did the *power of appointment* make any *alteration* therein; for the only effect thereof was, that the fee, which *was vested*, was thereby *subject* to be *divested* if *the whole* was appointed: or if part, *so much*, as was *not drawn out* of the inheritance, still *remained* in the father as part of the old fee; and there was no occasion to
put

put the inheritance in abeyance; which the court never did, but from *necessity*; and would so mould it by *opening the estate*, as in *Lewis Bowles's* case and several others, as best to answer the purposes of the limitations. But if the appointment was not made, it remained *undisturbed*.

It is to be observed, that this was not a case in which the estate was *originally* the father's, or *vested in him* at all before the settlement; where the limitation of the fee to him, being *the reversion*, and part of his *old estate*, would have *remained vested* in him till divested, by the vesting of a contingent remainder. But it was the case of money to be laid out in lands, where the father's title to the inheritance was to *originate in the same settlement* as the limitations to the children; and by *which* as Lord Hardwicke observed, as the father took also an estate for life, the inheritance according to the ordinary rules *vested* in him.

Doe v. Martin. Durnf. and East v. 4. p. 39.

And again in a very late case, where by marriage settlement lands were limited to the use of the wife and *her heirs* till the marriage, afterwards to her separate use for life, remainder to the use of her husband for life, remainder to the use of all and every child or children of the marriage, or such of them for such estates and interests &c. and in

in such parts, shares and proportions as the husband and wife should by deed appoint, and for want of such appointment, then to the use of the child or children of the marriage in such parts, shares, and proportions and for such estates and interests as the survivor of them should by deed or will appoint; and for want of such appointment, then to the *use of all and every the child or children* equally share and share alike &c.

Upon a question, whether the remainders to the children were *vested* or *contingent*; it was contended, that the power of appointment prevented their vesting, by absorbing the whole fee; and the cases of *Leonard Lovie*, *Loddington v. Kime* and *Lord Conway* were cited in support of this conclusion.

Lord *Kenyon*, after observing that the judgment must depend on the authorities cited; the three leading of which, were *Lovie's* case—*Walpole v. Lord Conway* and *Cunningham v. Moody*, and noticing the opinions in the two last, was happy to find that, in the last of those cases *Cunningham v. Moody* where Lord *Hardwicke* had an opportunity of reconsidering this question more fully, and at a time of life when his judgment was more mature, he determined differently, (from the opinions held in the two former.) His
 Lordship

Lordship said, he could not find any substantial distinction, between that case and the principal one. That the limitations to the children were, first *subject* to a power of appointment, but for want of such appointment to the children, &c. And whether the limitations preceded or followed the power of appointment, it made no difference.

That the opinion of Lord *Hardwicke* in the latter case was peculiarly deserving of attention; because when it was discussed, the former one of *Walpole v. Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him; and because too, he decided the last case, at a time when he had the assistance of some of the most eminent lawyers who ever attended the bar of that court. Lord *Kenyon* therefore thought, that on the authority of that case, the remainders to the children were vested, subject nevertheless to be divested by the parents executing the power.

And vide the same doctrine as to personal property.

1 Vez. 210.

2 Vez. 208.

Amb. 365.

Mr. Justice *Buller* further cited the case put by Mr. J. *Powell*. 2 Lord *Raym.* 1158. of a limitation to such persons as *A.* should appoint by will, remainder over, in support of the same conclusion, and judgment was given accordingly.

I cannot

I cannot dismiss the last noticed cases, without some observations upon the distinction between them, and the case of *Loddington v. Kime* and others of that kind; wherein it has been repeatedly decided, and now I apprehend, settled beyond dispute, that no limitations after a contingent limitation of the *fee simple absolute*, can be vested. The *prima facie* resemblance of the cases, seems to call for an attention to the grounds of distinction between them. Such indeed, is their first resemblance, as to have led Lord *Hardwicke* to the opinion he adopted in *Walpole v. Lord Conway*, when he referred to *Loddington v. Kime*, as an authority in point for it. But I have already observed, that the precedent does not appear to go the length for which it was so resorted to.

The first observable difference betwixt the case of *Loddington v. Kime*, and that of *Walpole v. Lord Conway* is, that in the former there was an actual *limitation of the fee* though in contingency. And it was therefore held, that any subsequent limitation of it must be equally contingent, as depending on the failure of the first, and only operating in the alternative of it; but in the case of *Walpole v. Lord Conway* as well as in those of *Cunningham v. Moody*, and *Doe v. Martin*, no actual limitation of the *fee* existed, or could exist,

exist, before the execution of the power of appointment. For a general power of appointing any estate or interest *ad libitum*, though *enabling* to limit the fee, does not ascertain any estate to be limited; therefore no limitation of the *fee* arises, until it be actually *appointed* under the power. The appointment when executed may not reach the fee; it may stop at an estate for years for life, or in tail; and until the appointment be complete, the power amounts no more to a limitation of the *fee*, than it does of an *estate tail*, or any other *ascertainable interest*, equally within the extent of the power, but in which the execution of it may *terminate*, without limiting the whole fee.

The cases therefore, wherein the estate to be appointed is not fixed by the power itself to be *in fee*, seem sufficiently distinguishable from *Loddington v. Kime*, on the ground I have noticed, of their not containing any limitation of the *fee*, until the appointment decides upon an estate to that extent: but the distinction, in this view of it, seems to fall short of those cases, where the power itself confines the operation of the appointment to the *fee* alone. As in the instance of a settlement to the use of *A.* for life, remainder to the use of such child or children of *A.* and *his or their heirs and assigns*, as *A.* shall by deed

deed &c. appoint; and in default of such appointment, remainder over. Here the power of appointment being fixed to a limitation of the *fee*, the case might possibly, on that account, be thought to be more nearly allied to that of *Loddington v. Kime*; and to amount to a contingent limitation of the fee by the deed itself, as in that case.

I am not apprised of any actual decision on a case thus circumstanced; the opinion, however, of *Powell J.* 2 *Lord Raym.* 1150. when he says, "That though it was a doubt
" in *Leonard Lovey's* case, whether a remainder could be limited after a *contingent fee*,
" yet it is none now; and therefore if a *fee-simple* be limited to such persons as *A.* shall
" appoint by his will remainder over, that it
" is a good remainder *vested* till the appointment" most completely reaches and applies to the very point; to which we may add, that there is not in any one of the above decisions, respecting the power of appointment not suspending the effect of the subsequent limitations, the least notice taken of any *difference* in this respect, between the operation of the appointment being confined to a limitation of the *whole* fee or not; nor among the reasons given for those decisions, is there any, the remotest reference to the latter ground.

This

This leads us to a conclusion, that the doctrine of *Loddington v. Kime*, is to be reconciled with that, in the above cases of limitations through the *medium* of powers of appointment, upon a principle founded in the *adoption or use* of that *medium itself*, abstracted from the extent or modification of the appointing power. And, I think, a proper attention to the subject, will shew, that the principle of the distinction I have already noticed, in regard to the cases where the power in them is not restricted to an appointment of the whole fee, is really founded on the *mode of limitation* by reference to the *medium of an appointment*, viz. that the *effect* of the limitation in any *shape or degree at all*, depends on, and *commences in*, the execution of the *appointment*: and in that view of the above principle of distinction, it seems indifferent whether the limits of the estate to be appointed, are ascertained or not, by the deed creating the power. For the *limits* of the estate are *nothing at all*, during the interval in which the limitation of the estate itself is *not subsisting*, that is, till the appointment gives it some direction, and supplies it with an object.

And here seems to be the foundation for one general distinction, between cases where the limitation of the fee is *originally* and *finally* contained in, and made by the *conveyance itself*;

itself; and those where its effect is referred to a subsequent direction or appointment. In the first case, there exists an actual limitation of the fee complete and perfect, as it ever can be, from the time of executing the deed; in the other, no limitation at all, however the power may be worded, actually exists, until the appointment gives it essence. The deed is not complete nor operative before, as to any limitations referred by it to the power of appointment. If no appointment is ever made, no such limitation is made; how then can it intercept or suspend the effect of limitations actually made. When the limitation is effected by an execution of the power, it may divest other substituted limitations, which had attached before its existence; but it would be strange to consider it as operating to their exclusion, during its own non-existence. Wherever the effect of the limitation is referred to a power of appointment, it is wholly ineffective from the execution of the deed, till that of the appointment; and as much a nullity, until raised by the execution of the power, as if it had never been noticed in the deed at all; but where, it is finally made by the original deed itself, it has all the existence, all the efficacy which it can derive from the deed; nothing remains to give the deed any further operation in respect to it. The limitation bears efficiency in it, from the execution

of the deed, and its ultimate effect only awaits the occurrence of the object, which it is directed, by the deed, to attach upon.

The above grounds of distinction, may perhaps, serve to bring all the cases, where limitations are referred to powers of appointment, within the doctrine in *Cunningham v. Moody* and *Doe v. Martin*; without in the least clashing with that of *Loddington v. Kime*, and others decided on the same principle; and I therefore thought, they merited some notice in this place.

Vide *supra*,
p. 12.

We may next observe, that the above cited cases of *Napper v. Sanders* (in which *C.* died before her husband, and therefore the event on which her remainder for life was to take effect never happened) and *Tracey v. Letbulier*, are two express authorities, that where a remainder is limited, even to a person *in esse*, so as to depend on a contingency, this contingency may be considered as confined to such remainder; without extending to or affecting the subsequent limitations; as was held in regard to the contingency of *C.*'s surviving her husband in the case of *Napper v. Sanders*, and in respect to the contingency of the daughter's leaving no issue living at her decease, in the case of *Tracey v. Letbulier*.

This

This brings our attention to those cases, wherein a condition annexed to a preceding estate, is, or is not, considered as a condition *precedent* to give effect to the ulterior limitations. We may distinguish such cases into three classes: First, limitations after a preceding estate which is made to depend on a contingency that never takes effect.—Secondly, limitations over upon a conditional contingent *determination* of a preceding estate, where such preceding estate *never takes effect* at all.—Thirdly, limitations over upon the determination of a preceding estate by a contingency, which though such preceding estate takes effect, never happens.

The above noticed cases of *Napper v. Sanders* and *Tracey v. Letbulier*, appear to fall under the first class of this distribution; in which cases we find, that the contingency affected only that estate, which it was first annexed to, without extending to the ulterior limitations.

So in a case referred to the court of *K. B.* from Chancery, where there was a devise in trust for the testator's son for life, and after his decease unto his first and other sons by any *future wife* in tail, remainder to the daughters of such future marriage in fee; followed by a proviso, that if his said son should thereafter marry with any woman re-

Bradford v. Foley.
Dougl. Rep.
63.

lated in blood to *M. A.* his then wife, all the above uses so far as they should relate to the issue of such future marriage, should cease and determine; it being his steadfast resolution, as far as the law enabled him, to *binder* that no person *any ways of kin to her in blood*, or born or descended from any such person, should inherit any part of his said estate; and in such case, notwithstanding there should be lawful issue of his said son by such future marriage, they should take nothing under his will; but the trustees should stand seised to the use of the testator's brother's children in tail; and in case of all their deaths in his own life-time or afterwards without issue, then he gave all his real estate to his own right heirs; he meant *such heirs only*, as should be no ways related *in blood*, or claim any descent from any person related in blood to *M. A.* his said son's *then wife*, all and every of whom he thereby *utterly excluded* from any right, title, or benefit from his real or personal estate in any shape whatsoever. After the testator's decease, *M. A.* died, and after her, the testator's son without issue, and without having married again. And it was contended that the limitations to the testator's brother's sons, depended on his said son's *marrying again*, and having therefore failed, the heir at law was entitled.

Lord Mansfield observed, that nothing could be *clearer* than the testator meant, that *no child of M. A.* should take in *any event*; and yet, according to the argument insisted on, such child, if there had been one, must have taken; and the court certified they were of opinion, that the children of the brother of the testator took estates tail with cross remainders. Here we see that upon the evident intention, the contingency of the son's marrying again &c. was confined to the estates limited to his future issue.

And in a later case, where a testator, after devising lands to his wife for life, and expressing his next desire to provide for his sisters, but considering that his *sister M. wife of W. was already well provided for, during the life of her said husband, and therefore would not, unless she happened to survive him, want any assistance to enable her to live in the world*; he devised certain lands to trustees their heirs and assigns, in trust that they and their heirs during the life of the said *M.* should pay the rents and profits to the testator's sisters *E.* and *B.* their heirs and assigns; and from and after the 'decease of the said *W.* in case the testator's sister *M.* should be then living, then to the use of the three sisters severally in thirds for their respective lives, with several remainders to their sons suc-

Horton v.
Whittaker.
1 Durnf. &
East 346.

sively in tail, remainder to their daughters as tenants in common, with cross remainders between the sisters on default of issue of their bodies respectively: it was held, that the condition of the married sister's *surviving* her husband, did not extend to any of the limitations subsequent to her estate for life.

The construction in these cases, as to the restriction of the *contingency*, to the estate first hinged upon it, appears to depend on the testator's apparent intention, not to extend it further. For wherever there is no apparent distinction in view in this respect, between such estate, and those which follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations.

Davis v.
Norton.
2 P. Wms.
390.

Thus in case of a devise to the testator's son and the heirs of his body, and if his said son should die without issue of his body, and the testator's wife *should survive* the said son, then the testator's wife should enjoy the premises for her life, and after her decease that the premises should be enjoyed by the testator's sister for her life, and after her decease (the testator's son, *William Hooker*, being dead, without issue as aforesaid) then the testator devised the premises over in fee: the testator's wife did not survive the testator's son, but he died after her without issue:
and

and upon a question, whether the ulterior devise over had not failed by the wife's death in the son's life-time, a case was (by consent) made for the determination of the Judge (*Reynolds*) who tried the cause; whose opinion was, that the remainder limited by the will was a contingent remainder, depending on the death of the son *without issue in the life* of the testator's wife; and as that contingency never happened, the remainder which depended thereon could never arise;— In this case the Judge seems to have laid much stress on the words, “the testator's son being *then dead* without issue *as afore-said*,” annexed to the remainder after the wife's decease, as *equivalent* to a repetition of the contingency first expressed, of the son's dying without issue the wife *then living*.

And again, where lands were devised to trustees, upon trust out of the rents to pay 20 *l.* annually to the testator's daughter for life, and to pay the residue of the rents, and the whole after her decease, to her husband for his life; *and if she should happen to survive her husband then to stand seised of all the lands upon the trusts after mentioned, viz. to his said daughter for life, then to her son H. and the heirs of his body, remainder to the heirs of the body of her husband by her, remainder to the heirs of her body by any*

Doe v.
Shippard.
Doug Rep.
75.

A a 4 other

other husband, remainder to her husband and his heirs for ever. The testator's daughter died in the life-time of her husband, and it was held that the limitations over should not take effect; for that the contingency was *not confined* to her *life estate*, but extended to all the subsequent limitations. The court not finding, upon the whole will, sufficient to gather a different intent; so as to warrant them in supplying the omitted words. In this case we may observe, that the contingency itself was expressly, by the words of the will, *extended* to, and equally *connected* with, *all* the subsequent limitations; for the trustees were, in *that event*, to stand seised of the lands to the several uses, intents, and purposes in the will after mentioned; *which uses* included as well the limitation *to the wife for life*, as those following it; so that there was no particular connection of the condition with her estate, more than with any of the rest.

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Scatterwood
v. Edge,
1 Salk. 229.

As an instance of that class, where subsequent estates were limited on a conditional determination of a preceding estate, and such preceding estate never took effect at all; we may refer to the case of a devise to trustees for eleven years, remainder to the first and other sons of *B.* successively in tail-male, provided they should take the testator's fir-

name; and in case they or their heirs should refuse to take the testator's surname, or die without issue, remainder to the first son of C. remainder over. B. died without having had any son, C. had a son at the time of the devise. The court did not agree as to the validity of the devise to the first son of B. being after a term of years without any preceding freehold to support it; but resolved that the subsequent limitation to the first son of C. who was then *in esse*, and capable, took effect; and that the preceding limitation to the first son of B. or the condition thereto annexed, did not operate as a precedent condition which must happen, to give effect to the subsequent limitation to the son of C. but was only a precedent estate attended with such limitation.

Of the same opinion was Lord *Hardwicke* 1 *Vezey* 422. in the case of *Avelyn v. Ward*; who said he knew of no case of a remainder or conditional limitation over, of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before limited by a conditional limitation, but if the precedent limitation, by what means soever be out of the case, the subsequent limitation should take place. As the said case of *Avelyn v. Ward*, and indeed most of the cases which occur upon this point, are cases wherein the *whole fee* was first

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Jones v. Westcombe,
1 Eq. Abr.
245.
Avelyn v. Ward,
1 Vez. 420.
Statham v. Bell,
Cowp. Rep.
40. and
other cases
noticed,
Infra 400. et
seq.

first limited, I shall postpone the further consideration of them to the chapter of executory devises; only observing in this place, that if such a conditional limitation is not defeated by the failing of the preceding estate, in those cases wherein the *whole estate* is first limited; *a fortiori* it should not be defeated, in the cases where the whole fee is not at first limited, but the remainder though conditional, includes the residue of the estate not before otherwise disposed of.

(165) As to cases of the third class, we may observe, that although where a remainder is devised to take effect on a condition annexed to a preceding estate, and that preceding estate *fails*, it appears, that the remainder shall nevertheless take place; yet, where such preceding particular estate *takes place*, and the condition is not performed: the remainder, it has been held, will not take effect at the expiration of such preceding estate; unless in those cases, where the apparent general intention of the testator calls for it.

3 Atk. 285.

It has, indeed, been contended, that, where a testator gives a particular estate, and after limits an estate over, upon a contingency, which is to determine the particular estate, sooner than it would otherwise determine;

mine; there, though the contingency does not happen, nevertheless the limitation over shall be good after the determination of the first estate: But Lord *Hardwicke* denied there was any such rule; for that all the cases which could be put, depended on particular words, and the intent of the party: and to prove it, cited a case where *A.* devised his estate to his son in tail male, remainder to *B.* for life, remainder to his sons in tail-male, on condition he should change his name, and if he, or any son of his refused to do so, then he directed the devise to be void, and gave the estate to *D. &c.* The son died without issue, *B.* performed the condition and died without issue; and upon a question whether *D.* should have the estate after *B.*'s death; the judges of K. B. certified their opinion, that *D.* took no estate on the death of *B.* but that it went to the heir at law of *A.*: which opinion was confirmed by the House of Lords in 1729.

Amhurst v.
Litton.
In Chanc.
1727.
Brown's Cas.
Parl. v. 3.
p. 486.

And accordingly, in a case where *A.* devised his house &c. to his wife for life, upon this *express condition only* that if she should marry again, then his will and meaning was, that the house &c. should go forthwith to his eldest son and his issue, and if all his issue-male should die &c. remainder over; Lord

3 Atk 282.
Sheffield v.
Lord Orrery.

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Hardwicke

Hardwicke held that it was not a *vested* remainder in the son, but a *contingent* limitation, to take effect only if the wife of the testator should marry again. It was contended to be a devise to the wife during her widowhood, in which case the devise over would have been vested, to take effect either on the marriage or death; but Lord *Hardwicke* thought, upon the whole will, the devise over was contingent, and to take effect only on the widow's marrying again; the words, he said, were upon *this express condition only, that if his said wife should at any time marry again &c.* That as to the case of *Luxford v. Cbeke*, which was pressed upon him, and he acknowledged it to be the strongest case cited, he said, the penning was different; for there after the devise, were added the words *if she do not* marry again, which, he said, restrained the original limitation, and were the same as if they had been to the wife for life, *if she so long continue a widow*; that the cases appeared to him to differ in substance, for there were no words in the cited case, that could substantiate the testator's intent without construing it an estate tail; but in the principal case there was no necessity for such a construction; and the intent of the testator was more effectually answered by the construction he adopted, than any other.

In the case of *Luxford v. Cheeke* cited, in that which I have last noticed, the testator devised his estate to his wife for life, *if she should not marry again*, but if she did, then, that his son *H.* should presently after his mother's marriage, enter, and enjoy the premises to him and the heirs-male of his body, remainder to testator's other sons successively in like manner, remainder over: the wife survived the testator, and died without marrying again: the question between the heir-general of the testator, and the issue-male of one of the sons, was, whether the condition not having been performed, the remainder to the sons in tail, took effect? The court held that it did; for that by the whole scope of the will, the testator intended an intail; and rather than the intent of the testator should be defeated, the court construed the devise to the wife, to be the *same as a limitation to her during widowhood*, remainder over &c. to commence on the determination of the wife's estate, whether by marriage or death. And it is observable, that *Hale C. J.* expressed a similar opinion in *Lady Ann Fry's* case; where, he said, it is all one as if the estate had been devised to her for life, *and if she marries then to remain*, which had been but an estate *quam diu sola vixerit*.

Luxford v.
Cheeke.
3 Lex. 125.
Raym. 427.
Brown v.
Cutter.

1 Vent. 203.

In

Jordan v.
Holman.
Ambl. 209.

In a case where a testator devised lands to his wife *during her widowhood*, and if *she should marry again*, that then his daughter should enter, provided that if his wife married and survived his daughter, the estate should return to her. Lord *Hardwicke* took a distinction between the devise of an estate during widowhood, with remainder over; and a devise during widowhood with remainder over on her marrying again within a *limited time*.

Doe v. Freeman & Wife.
1 Durnf. & East 389.

Where there was a devise to a wife provided she remained a widow, but in case she married a second husband, then to testator's nephew when he should attain the age of twenty-three years; it was held, that the widow had an estate *till* the nephew attained the age of twenty three years, though she married before.

Vide Jeffreys
v. Reynous,
6 Brown's
Parl. Cas.
260.
Gordon v.
Adolphus
ibid. 364.
all cited
infra. p. 406.

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There are some other cases of dispositions on the *event of a second marriage*, being extended in construction to death *without marriage*, which as they concerned personal estates *only*, I shall refer to the head of executory devises. But here I may observe, that a limitation may be so penned, as to take effect either as a *conditional limitation* in derogation and abridgment of a preceding particular estate, upon the performance of

of a condition annexed to such preceding estate ; or as a *remainder* expectant upon such preceding particular estate, though the condition be not performed ; as appears to have been the fact in the case of *Scatterwood v. Edge* above cited ; where, supposing the limitations to the sons of *B.* good, the subsequent limitation to the first son of *C.* was to take effect either upon the sons of *B.* refusing to take the testator's surname, or otherwise upon failure of issue of the sons of *B.* I shall also postpone the further notice of this sort of limitations till I come to treat of executory devises.

Supra 163.
And vide
Cro. Jac.
697.
Foy v. Hind.
Vide infra.
396. et seq.
And *Doe v.*
Fonnereau,
Dougl. Rep.
and the Re-
porter's note
there 486.
noticed here-
after.

It sometimes happens, that a remainder is limited in words which seem to import a *contingency*, though in fact they mean no more, than would have been implied without them ; or do not amount to a *condition precedent*, but only denote the time when the remainder is to vest in *possession*.

Thus, where there was a devise of land to *A.* and *B.* for eight years, and after the said term to remain to the testator's executors, till such time as *H.* should accomplish his age of twenty-one years ; and when the said *H.* should come to his full age of twenty-one years, then the testator willed that *H.* should enjoy the lands to him and his heirs for ever.

H. died

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3 Rep. 19.
Boraston's
case, and
Vide 1 P. W.
170.

H. died under twenty-one; and it was contended that the remainder did not vest in *H.*, because he did not live to attain the age of twenty-one years; for that, as he was not to have it until his age of twenty-one, it was *contingent* on that event, it being uncertain whether he ever would attain that age. But it was held, that the case was nothing else in effect, than a devise to the executors till *H.* attained the age of twenty-one years, remainder to *H.* in fee; and that the adverbs of time *when* &c. and *then* &c. do not make any thing necessary to precede the settling of the remainder; any more than in the common case of a lease for life or years, and after the decease of the lessee or the term ended, remainder to another, in which cases the remainder vests presently. And that these adverbs expressed the *time* when the remainder to *H.* should take effect *in possession*, and not when it should become *vested*.

And vide
2 Atk. 304.
And Mans-
field v. Du-
gard.
Goodtitle v.
Whitby,
and Doe v.
Lea, *infra*.
171. 172.

Moor 487.
Holcroft's
case.

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So where there was an estate given to *A.* for life, and afterwards to his first, second, third and fourth sons in tail, and if his fourth son die without issue, then to *B.*; this was held a remainder vested in *B.*; and the same thing as if it had been said *remainder to B.* where the fourth son's dying without issue is implied; that it was not a *condition*, but an expression

expression of the time when the remainder should vest in *possession*.

So where a testator devised houses to S. his son after the death of his wife, and if his three daughters or either of them should over-live their mother and S. their brother and his heirs, they to enjoy the same houses for the term of their lives, remainder to J. and W. After the testator's decease, the son and two of the daughters died without issue, then the mother died, and afterwards the third daughter. One of the questions upon this will was, (after it had been resolved that by *heirs* of S. was intended *heirs of his body*) whether this remainder to J. and W. was *contingent* upon the event of the daughters *surviving* their mother and brother; and if so, whether the condition was well performed, two of the daughters having died in their brother's life-time; but the court resolved that it was not a contingent limitation, but only an expression when the remainder should commence (*i. e.* take effect in *possession*.)

Cro. Jac.
416.
Webb v.
Herring.
And vid. Cro.
Eliz. 26.
Lee v. Vin-
cent, and
Gold v.
Goddard.
2 Jones 111.

And where one devised all his lands to his wife for life, and after her death to his three daughters equally to be divided, and if any of them died *before the others*, then the others to be heirs, and if they all died

King v.
Rumball.
Cro. Ja. 449.

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without issue, remainder over; and it was adjudged that they all took *vested* estates-tail.

Cro. Jac.
695.
Chadock v.
Cowley.

So a devise of *Blackacre* and *Whiteacre* to *M.* for life, and after her death, *Blackacre* to *B.* and his heirs for ever, and *Whiteacre* to *C.* and his heirs for ever, and that the *survivor* of them shall be heir to the other, if either of them *die without issue*: was holden to be an *immediate* estate-tail in each with a vested remainder to the other; and not a *contingent* limitation to the survivor on either's dying without issue in the life-time of the other; but if it had been, if either of them die without issue, *living the other*, or *before such an age*, the devise over would then, it seems, have been *contingent* on such event.

Fortescue v.
Abbot.
Pollex. 479.
Sir Thomas
Jones 79.

Again, where a testator having four children, devised one house to his eldest son and heir, without limiting any estate; and so devised three other houses to his other three children respectively; and willed that if either of his said children should depart this life, then the houses so given them should be equally divided betwixt them *that are living*. The eldest son died, and it was contended that this limitation over to the children then living, was a *contingent* remainder to the *survivors*, depending on the particular estates for life in the children; and that the eldest

son's

son's estate for life, in the house devised to him, was merged in the fee which descended on him upon his father's decease; and consequently the contingent remainder to the survivors in this house was thereby destroyed. But on the other hand, it was insisted, and so adjudged by the court, that this was not a contingent remainder, but a *vested* remainder; and that every child took a particular estate in his or her house for life, with remainder to the others for their lives *vested*, agreeable to the resolutions in the above cited cases of *Webb v. Herring*, *King v. Rumbal* and *Chaddock v. Cowley*. — It is observable that this case is wrongly reported by *Levinz*, who says 2 Lev. 202. he heard that the court held it good as an executory devise. But both *Pollexfen* and Sir *Thomas Jones*, who argued the case, report the decision of the court as above stated.

And in a case where one devised lands to K. and the heirs of her body, and if K. died without issue, to J. for life; and in another clause of the will he devised, that if K. died without issue and J. be then deceased, then and not otherwise, he gave the land to N. and his heirs. Upon a bill by N. after the death of K. without issue and of J. to have the trust executed, it was decreed for N. although J. survived ~~K~~ because the words (if J. be then deceased) seemed to be put in to

2 Ventr.
365. anon.

B b 2

express

express the testator's meaning, that *Y.* should be sure to have it for her life, and that *N.* should not have it till she were dead; and to shew when *N.* should have it in possession.

Stocker v.
Edwards.
2 Show. 398.
Vide Edward
v. Ham-
mond.
3 Lev. 132.
Where the
same case
seems to be
somewhat
differently
reported.

So where there was a surrender of copyholds, to the use of the surrenderor for life, and afterwards to the use of his youngest son, and the heirs of his body, *if he attained* the age of eighteen, and if he died before eighteen without issue-male, then to the right heirs of *A.*; it was held to be a condition subsequent with respect to the youngest son; and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue-male before he attained the age of eighteen. Here it was evidently the intent, that the estate should not go to the heirs of *A.* if the younger son died before eighteen leaving issue-male; but if the estate was not to vest till he attained eighteen, this intent could not have been satisfied.

Mansfield v.
Dugard.
1 Eq. Abr.
195.
And vide
2 Atk. 304.
Tredd v.
Downs.

In the case of a devise to the testator's wife, till his son should attain to his age of twenty-one years, and *when* his son should attain to that age, then to his son and his heirs, the son died at the age of thirteen years; and it was held that the wife's estate determined on his decease; and that the remainder

der vested in the son upon the testator's death, and did not expect the contingency of his attaining twenty-one years of age.

And where the testator devised lands, to two trustees and the survivor of them and his heirs, in trust to lay out the rents and profits for the maintenance of two nephews of the testator during their minorities; and when and as they should attain their respective ages of twenty-one years, to be and remain to those two nephews and their heirs equally; it was resolved, that the nephews took the fee *immediately*.—And upon a devise to *A.* to the use of *B.* till *B.* attained the age of twenty-one and then to *B.* in fee, it was held the fee vested immediately in *B.*

Goodtitle v.
Whitby,
1 Burr. 228.

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Denn v.
Satterthwaite
1 Black. Rep.
519.

So in a still later case of a devise to trustees and their heirs, until the testator's great nephew, then an infant of about thirteen years of age, *should attain the age of twenty-four years*, on condition out of the rents &c. during that time to keep the buildings in repair; and he devised unto his said great nephew and to his heirs and assigns for ever, *when and so soon* as he should attain his age of twenty-four years, the premises in question; and directed the trustees to surrender the premises (being copyhold) accordingly; it was held that the fee vested in him immediately, and upon his death intestate, under

Doe v. Lea.
3 Durnf. &
East 41.

Vide Brownf-
word v.
Edwards.
2 Vez. 343.
And infra.
438—9.

twenty-four years of age, descended to his heir at law; and here the distinction was noticed between the words *when* and *then* &c. only denoting the time of vesting in *possession*, and the *conditional* word *if*.

Vide Moor-
house v.
Wainhouse.
1 Black.
Rep. 633.
Doe v.
Wilkinson.
2 Durnf. &
East 209.
Roundell v.
Curren.
2 Brown's
Canc. Caf.
67. noticed

Here I might also notice, as in some degree connected with the cases I have been treating of, certain instances of conditions *precedent*, not founded on any *contingency* of the effect or determination of any antecedent estate, created by the same instrument. But for the cases of this nature, not falling under the designation of contingent remainders, I shall refer to the last part of this treatise.

among other cases infra. 406.

Vide Spring
v. Caesar.
2 Roll. Abr.
415. pl. 12.
And infra.
198.

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Supra, 171.

Vide infra.
406. et seq.

Some instances are also to be met with, where the contingency, upon which an estate is limited, has been considered as a condition *subsequent* instead of *precedent*, so that the estate becomes vested *immediately* subject to be *defeated* by the condition when it happens, in the room of not taking effect till such condition happens; the case of *Stocker v. Edwards* above stated, may be considered as an instance of this sort; but the cases of this class appear rather to belong to the descriptions of shifting uses or trusts, or executory devises of which I shall treat hereafter.

**Of the Nature of the Contingency upon
which a Remainder may be limited.**

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IN the limitation of contingent remainders, it is necessary that regard be paid to the nature of the contingency, upon which the remainder is intended to take effect; for the limitation, intended as a contingent remainder, may fail of effect, on account of the following circumstances, respecting the contingency upon which it is limited to take effect.

1st, The contingent event's being an *illegal* act.

2^{dly}, The *remote possibility* of the contingent event.

3^{dly}, The condition's enuring to *defeat* the preceding estate.

This third or last objection, may again be subdivided into two branches; the first relating to those cases, where the condition upon which the subsequent limitation is intended to arise or take effect, is repugnant to any rule of law, or contrariant in itself, or inconsistent with the quality or nature of the

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preceding estate; the second extending to all other cases where such repugnancy, contrariety or inconsistency is out of the question; but the condition merely operates to defeat or abridge the preceding estate.

The first two of the three general grounds of objection above noticed, extend to those limitations which (so far as respects their relation to the preceding estate) fall within the proper description of *remainders*. But the third or last objection, renders all limitations to which it applies ineffectual as *remainders* (because a remainder, properly so called, cannot enure to defeat or abridge the preceding estate); and as to such limitations as fall within the first branch of this objection, they are intirely void; whilst many of those to which only the latter branch of the objection is applicable, may take effect in *wills*, or by way of use or trust, or in surrenders of copyholds, as *conditional limitations, future or shifting uses or trusts*, though void as *remainders* in the strict sense of that word.

Vide supra.
9 & 10.
Infra 187-8.

2 Co. Rep.
51.
P.ow. 32.

To begin with the first objection, Lord Coke tells us, the law will never judge a grant, by reason of a possibility or expectation of a thing which is against law, for the same is *potentia remotissima*, and which by intendment of law *nunquam venit in actum*: of this

a Remainder may depend.

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this nature was the possibility of a man's entering into religion by becoming professed. Upon the same principle, a limitation to a bastard not *in esse* is held to be void; for the law does not favour such generation, or expect that such should be.

Cro. El. 509.

As to the second point, it is requisite that the possibility upon which a remainder is to depend, should be a common possibility and *potentia propinqua*, as death, or death without issue, or coverture, or the like. Therefore a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be erected during the particular estate. But if during the vacation of the mayoralty of *D.* a lease for life be made, remainder to the mayor and commonalty of *D.* this remainder is good, if there be a mayor of *D.* elected during the estate for life.

2 Co. Rep.
51.
10 Co. Rep.
31. b.
Hob. 33.
4 Leon 223.
Mo. 104.
1 Inst. 264. a.

So if there be a lease for life, remainder to the heirs of *J. S.* though this remainder be good,* because by common possibility *J. S.* may die during the particular estate; yet if there be no such person as *J. S.* at the

2 Co. Rep.
51.

* Of the limitation to the heirs &c. of a person attainted, vide 1 Co. Rep. 103. Hob. 31, 32. and Wheatly v. Thomas. 1 Lev. 73. 1 Keb. 349. 436. 549. 615. 745.

time

And vide
Mayor and
Com. of Lon-
don v. Al-
fred.
Cro. Car.
575.
1 Jones 452.
3 Mod. 29.

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1 Inst. 25. b.
184. a.

1 Co. Rep.
156.
2 Co. Rep.
51.

time of the limitation, notwithstanding such a person should afterwards be born, and die during the life of the tenant for life, his heir shall not take by virtue of such limitation; because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies, not independent and *collateral*, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, viz. *First*, That such a person as *J. S.* should be born which is very uncertain; and *Secondly*, That he should also die during the particular estate, which is another uncertainty grafted upon the former. This is called a *possibility upon a possibility*, which Lord Coke tells us is never admitted by intendment of law.

Upon the same ground ariseth the distinction, between a remainder limited by a general description, and one limited by a particular name to a person *not in esse*. In the first case the remainder is good, as a limitation to the right heirs of *J. D.* who is alive, or *primogenito filio* of *B.* who has no son then born; but in the other case the remainder is void; as if a remainder be limited to *G. son of D.*; in that case, if *D.* hath not a son named *G.* at the time of the limitation, the law will not expect he should afterwards have a son so named,

named, because it amounts to a possibility upon a possibility, viz. *First*, that he should have a son, and *Secondly*, that such son should be named G.

And vid.
infra fol.
391-2. of a
limitation to
a child of an
unborn child,
&c.

In regard to the third objection, to begin with the first branch of it, viz. the *repugnancy, contrariety, or inconsistency* of the condition. It has been held, that a condition or limitation must determine or avoid the *whole* of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue. Upon this principle it has been adjudged, that a proviso to make the estate of tenant in tail cease *during his life*, is void; for that although the whole estate may be determined by a condition, yet part of it only, viz. *during the life* of tenant in tail shall not; in which instance the proviso is ineffectual, on account of its *repugnancy* to a rule of law.

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Vide 1 Rep.
86. b.
6 Rep. 40. b.
Vide 4 Burr.
1941.

Again, it may be *contrariant in itself*; as in the case of a proviso for determining an estate-tail, *as if tenant in tail were dead*; this has been held a *contrariant* proviso, and void on that account; because the death of tenant in tail does not determine the estate-tail, but his *death without issue*; and consequently to say that the estate-tail shall determine, *as if he were dead*, amounts to saying that it shall determine, as it would do upon an event,
(viz.

1 Rep. 86. a.

(viz. death of tenant in tail) which event might not determine it; and therefore such a proviso is contradictory and absurd in itself.— I shall now adduce two or three leading cases, wherein the proviso was held void on both these last mentioned grounds.

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Corbet's case,
1 Rep. 83. b.

Thus where C. covenanted to stand seised of lands to the use of himself for life, remainder to the use of R. and the heirs-male of his body with divers remainders over. PROVIDED, That if R. or any of the heirs-males of his body should attempt or procure any act or thing, by which any estate-tail so limited should be undone, barred or determined, &c. that then after that &c. the uses and estates to him limited who should so do, &c. should cease, only in respect to such person so attempting, in the same manner as if such person so attempting, &c. were naturally dead; and that then immediately in all such cases, the uses of such lands should be to such persons to whom the uses should come, if such persons so attempting, &c. were naturally dead, of such and the like estate, and in the same manner and form, and with such remainders over, and under such limitations and restrictions, &c. as if such person so attempting, &c. were naturally dead.

Afterwards C. died, and R. suffered a common recovery to his own use &c. The next
in

in remainder immediately thereupon entered, and upon the question, whether such entry was lawful or not, the justices of the C. P. unanimously agreed, that this proviso to cease an estate limited to one and the heirs-male of his body, *as if the tenant in tail were dead*, was repugnant, impossible and against the law. For the *death of tenant in tail*, is not a cesser of the estate-tail; but the death of tenant in tail *without issue of his body* is the determination thereof, &c.

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And in *Corbet's* case, two other similar cases were cited by the court; the one upon a *will*, where after several limitations in tail, a proviso of the like nature was inserted. One of the devisees in tail levied a fine, whereupon the next in remainder claimed the lands by force of the proviso; and upon solemn argument it was adjudged, that the proviso of restraint was void, because it was against law and repugnant; for by a proviso, condition or limitation, the *whole estate* ought to be *defeated*; and that it cannot determine the estate for part, and continue it for the residue; and that an estate in land cannot *cease* for a time and *revive* and *revest* afterwards; and that a proviso to cease an estate tail, *as if tenant in tail were dead*, is repugnant, because the estate-tail is not determinable on his death, but on his *death without issue*. The other

Jermyn v. Arscot, cited
1 Rep. 85.

Vid. 4 Burr.
1941.
And *Nicolls v. Sheffield*.
2 Brown's
Canc. Caf.
215. &
Heneage v. Heneage.
4 Durnf. &
East 13. infra
321.

was

Cholmley v.
Humble, cit.
1 Rep. 86.

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And vide
Moor 470.
pl. 678.

was a case arising upon a conveyance to uses, whereby the lands were limited to the use of H. and the heirs-male of his body, with divers remainders over. PROVIDED, *That if H. or any of the heirs of his body should attempt or make any feoffment, &c. that his estate should cease as if he were dead. And the feoffees and their heirs should stand seised of the lands to the use of such person to whom the same ought to descend or remain according to the limitations.*—H. levied a fine, and upon the question whether the next remainder-man became thereupon intitled to the lands, it was held, that a proviso to determine an estate tail *as if tenant in tail were dead*, was against law and repugnant; and that a condition or limitation ought to destroy all the estate to which it is annexed, and not part of it only.

6 Rep. 40.
Mildmay's
case.

Again, where there was a limitation in tail, with a proviso, that if the tenant in tail should advisedly and effectually attempt, procure and go about, or assent to do any act, &c. touching any bargain, sale, discontinuance, alteration, &c. of the lands whereby any estate, &c. might be discontinued, &c. that then from the time of such procuring, attempting, &c. his estate should cease as if he were dead; it was held that the words attempt, go about, &c. were uncertain and void in law; that inheritances ought not to depend on such uncertainties;

ainties; for that the law doth reject conations and goings about, as things uncertain, which cannot be put in issue.

And so in another case, where there was a limitation over, upon tenant in tail or his issue *effectually* and expressly assenting, concluding, doing or going about to do, or make any act or acts to alter, discontinue or change the estate, &c. and tenant in tail levied a fine by agreement. The court said here was no limitation to enter, but after the *effectual* going about, and it was not *effectual* till after the act done; and when the act was done, the remainder was discontinued. And it was held, that these words were too ambiguous to determine an inheritance by limitation.

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Foy v.
J. Hynde
Cro. Jac. 697.

In the last case it was held, that when the act was done, the remainder was discontinued; and *Plesington's* case, 2 *Rich.* 2. was referred to for this point; where upon a lease by *A.* to *B.* on condition that if *A.* granted the reversion, then *B.* should have fee. It was held that when *A.* granted the reversion by *fine*, *B.* should not have the fee; for that the *fine* transferring the fee to the conuzee, it would be absurd and repugnant to reason, that the same *fine* should work an estate in the lessee; for one alienation could not vest an estate in one and the same land, in two several persons

Plesington's
case.
Vide 1 Co.
Rep. 84. b. 8.
Co. Rep. 76.
a Co. Lit.
378. b.
Plowd. 26. a.
487. a. Perk.
f. 729.

at

at one time. And *Perkins* observes, if the lessor had granted the reversion to a stranger by deed, the lessee in such case would have had fee by the condition; *because* the reversion was not in the grantee before attornment; and yet the feoffee had granted the same, and against that grant could not plead he did not grant by the deed. The above doctrine as to the invalidity of the limitation after alienation, &c. is held in *Richel's case*, and Lord Coke's comments thereon.

Perk. f. 730.

Richel's case.
Co. Lit. 377.
b.—379.

We are further to observe, that there are certain incidents and qualities so annexed to and inherent in certain estates, as to be incapable of being restrained or prohibited by any proviso, condition or limitation; and therefore, where an estate is limited to take effect upon any such restrictive condition annexed to a preceding estate, such limitation is held to be void and incapable of taking effect at all. I shall instance this in the case of an estate-tail; to which the power of suffering a common recovery, and of levying a fine (within statutes 4 H. 7. and 32 H. 8.) is so incident and adherent, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void.

6 Rep. 41.
10 Rep. 38.
b. vide 2.
Vern. 635.

As

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Mary Port-
ington's case,
10 Rep. 36.

As where lands were devised to several daughters successively in tail; with a proviso that if any of them should *conclude and agree* to or for the doing or executing of any act, &c. whereby the lands intailed, &c. or any estate or remainder thereof, should by any way or means be discontinued or aliened; or should do any act or thing whereby the lands might not descend, remain, or come as limited by the will; that then the person so *concluding and agreeing* to or for the doing and executing of any such act &c. should immediately after such conclusion and agreement &c. lose and forfeit &c. such estate and benefit as she and they might claim, in such manner as if she or they had never been named in the will; and thenceforth the estate and estates limited to her or them &c. should utterly cease, as fully to all intents and purposes as if she or they &c. were *dead without heirs of their bodies*. The first tenant in tail concluded and agreed to suffer a common recovery, and suffered one accordingly; the next in remainder claimed the estate as forfeited; and contended, that if the donor could not restrain the recovery after it was suffered, because thereby the remainder was barred, yet he might restrain the *conclusion and agreement* to suffer it, to prevent the bar by the recovery.

(184)

And vide
9 Rep. 128.
Sunday's
case.
And Co.
Lit. 13 edit.
n. 1. 223. b.

But it was adjudged in that case, that tenant in tail cannot be restrained by any condition or limitation from suffering a recovery; and that it was absurd to say, that the recovery itself cannot be prohibited by any condition or limitation, and yet that the *conclusion or agreement* to suffer it may be prohibited; and it was also laid down in the arguments in the same case, that the levying a fine within *stat. 4 H. 7. c. 24.* and *32 H. 8. c. 36.* to bar the issue, was of the number of those incidents to an estate-tail, which could not be restrained by condition.

Scholastica's
case, Plowd.
403. or
Newis v.
Lark.

And though *Scholastica's* case (where tenant in tail, under a proviso of this nature, levied a fine and suffered a recovery, and it was held by the court, to have determined the estate-tail by limitation, and have given title of entry to the next in remainder, the point respecting the invalidity of restraining a recovery being not at all moved in the arguments upon the case) was cited in *Mary Portington's* case, as an authority in support of the validity of the restriction; yet it was observed, that the tenant in tail, in *Scholastica's* case, first levied a fine, which, for any thing that appeared, was a fine at the common law; and then it was a discontinuance and wrong, and therefore might be restrained by condition. And, besides, that it was afterwards

10 Co. Rep.
42. a.

(185)

wards in the King's Bench by *Popham C. J.* and two other justices, for the matter in law, resolved in *Scholastica's* case, against the former opinion, though the judgment was given upon an incurable imperfection in the verdict.

Vide Cro.
Eliz. 437.
Bateman v.
Allen.

There is also another case, where upon a devise to a younger son and the heirs of his body, upon condition that neither he nor any of the heirs of his body should alien or discontinue the lands, &c. it was held to be a condition; and a fine levied by him with proclamations, was held such a breach of the condition, as to intitle the heir of the testator to enter. Upon which, I shall only observe, that this case was in 38 *Eliz.* antecedent to the cases of *Sunday* and *Mary Portington* above cited; and before the distinction between a fine at common law, and one by the statute, in respect to the first being capable of being restrained by a condition annexed to an estate tail, and the latter not, appears to have been taken.

Vide Rudhall
v. Milward,
Savil 76.
Moore 212.

The distinction between the preceding cases of *Corbet*, of *Jermyn v. Arscot*, *Cholmley v. Humble* and of *Mildmay*, and that of *Mary Portington*, is to be attended to. In the four former, the proviso was repugnant to a rule of law, as being confined to the avoid-

ing only *part* of the estate-tail, viz. so far only as respected tenant in tail himself, still leaving it good as to his issue; and also involved something contradictory and absurd in itself, being to determine the estate-tail, as if *tenant in tail were dead*; which, in fact, does not determine the estate-tail. Whereas the case of *Mary Portington* steered clear of these objections; the proviso there enuring to defeat the *whole* estate-tail; and to determine the estate-tail as if tenant in tail were dead *without heirs of his body*; which really is a determination of the estate-tail. The question, therefore, in this last case did not respect the general validity of the proviso, but only the extent or application of it to a particular act, viz. the suffering a recovery; and we see it was determined that the restriction was void as to that; and would have been equally so as to a fine levied pursuant to the statutes of H. 7. and H. 8.

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But however, such a proviso or limitation as that in *Mary Portington's* case, it seems, may extend to restrain a feoffment, or even a fine *at common law*, or any other tortious discontinuance or alienation; and a breach of it by any such tortious alienation, may give effect to the condition or the limitation over, and a title of entry to the person claiming by force

force of it. This was admitted in the arguments in *Mary Portington's* case.

Thus where a devise was to one and the heirs-male of his body, with a proviso, that if he *attempted* to alien, then immediately his estate should cease, and another should enter; the devisee made a feoffment, and though it was held that the condition, *viz.* to *attempt to alien* was void, for that a man cannot be restrained from an *attempt* to alien, for *non constat*, what shall be judged an *attempt*, and how it can be tried; yet it was agreed on all hands, that tenant in tail might be restrained from aliening by feoffment or other act which was tortious, and would make a *discontinuance*; though he could not be restrained from aliening by fine or recovery.

Peirce v.
Win.
1 Ventr.
321.

Vide Co.
Lit. 224. a.

And, indeed, in a former case where lands were given in tail, upon condition that if the donee or his heirs discontinued, the donor should enter; the donee had issue two daughters and died; the daughters had issue two sons and died; one of the sons discontinued, and it was held to be a forfeiture. *Leonard*, in his report of this case says, the discontinuance was by fine; and so it might be, agreeable to the observation made in *Mary Portington's* case, in regard to the fine in *Scholastica's* case, if we suppose it to have been a fine at common law.

(187)
Croker v.
Trevithen,
Cro. Eliz.
35.
1 Leon 2.

Spittle v.
Davis.
2 Leon. 38.
Moor 271.

And so where lands were devised, part to testator's eldest son in tail, part to his youngest son in fee, provided that neither of the said sons should sell or lease the lands so given them, or do any act, &c. before they came to the age of thirty years. And if either of them did, then the other should have the portion so devised to his brother. The eldest son leased the lands devised to him before he attained that age; and it was held that the entry of the youngest son upon him was lawful.

Vid. supra,
p. 9 & 10.

(188)

But all these last mentioned cases, where the condition is not void, fall within the latter branch of the third objection above noticed; being of that class, where, as the condition enures to defeat the preceding estate, the subsequent limitation cannot operate as a remainder in the strict and proper sense of that word; though it may still take effect as a conditional limitation by devise, or by way of future or springing use.

Plowd. Com.
24. b.
Vide Dr. and
Stud. lib. 2.
cap. 21.
Perk. f. 831.
Co. Lit. 214.
377.—379.
Vide supra
9, 10.

Now, to come to the latter branch of the third and last above noticed ground of objection; we are to observe, that it is laid down as a rule in conveyances at common law, that every remainder must be so limited as to wait for the determination of the particular estate, before it is to take effect in *possession*; and not to take effect in *prejudice*

judice or exclusion of the preceding estate. This rule not only flows of necessity from the definition of a remainder, which I have considered in the beginning of this essay; but also follows, as the consequence of a maxim at common law, that none shall take advantage of a condition, but the party from whom the condition moves (*i. e.* the grantor) and his heirs; for if he or his heirs take advantage of a condition by entry or claim; the livery made upon the creation of the estates is defeated, and of course every estate then created is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate; and at that instant we see both preceding estate and remainder, are defeated by the entry of the grantor. Therefore such remainder is void. It follows that a remainder properly so called, cannot be limited to take effect upon a condition which is to defeat the particular estate; whether such condition be repugnant to the nature of the estate to which it is annexed, or not.

Suprap. 7. 8.

(189)

Thus for instance; if a lease for life be made upon condition, that if a stranger pay to the lessor 20*l.* then *immediately* the land shall remain to the same stranger, this remainder, it seems, is void; for the tenant for life ought to have it during his life, and

Plowd. Com.

29. b.

2 Leon. 16.

if so, during that time the stranger cannot have it ; for he can take no advantage of the condition, but only the grantor or his heirs ; but had it been limited, that if a stranger pay to the lessor 20*l.* then, *after the death of tenant for life*, it should remain to that stranger, it would have been a good remainder.—The distinction between the two cases is this ; in the latter, the remainder is not to vest in *possession* till after the determination of the estate for life, when it may vest of course ; in the former it is limited to take effect in *possession*, on the performance of a condition, which is to defeat the estate for life ; and not to wait till the particular estate be determined, by means to which its nature is subject in its original limitation.

(190)
Plowd. 24.

So if a lease be made to two, the remainder over in fee after the death of *the first of them*, this remainder is void ; because as the survivor must have the lands during his life by the nature of the first estate ; the limitation over after the death of the first of them cannot take place, without defeating the first estate as to the survivor.

Vide Jo. 58.
And vide
Sayer v.
Hardy.
Cro. Eliz.
414.

Upon the same principles it seems, that if an estate be granted to *A.* a widow for life, remainder to *B.* in fee, on condition that *A.* continues a widow ; if *A.* marries, the entry
of

of the heir defeats the estate to *A.* and to *B.* also; but that, if an estate had been granted to *A. durante viduitate*, remainder to *B.*, upon *A.*'s marriage her estate determines by the nature of its limitation, and the remainder to *B.* takes effect.—This must be understood of estates at common law. For dispositions by devise in the event of a second marriage, may be construed according to the apparent intent as we have seen before.

Moor 408.
Ow. 107.
Gouldsb.
179.

Supra, p.
166.

Here however, we are to observe, that if land be leased to one for life &c. and if such a thing happen, *then* to remain to *B.* &c. this shall not be understood as intended to vest in *possession*, immediately upon the happening of the condition, and in abridgment of the preceding estate; because under that construction the remainder would be void for the reasons already given; but it shall be construed to vest in *interest* upon the happening of the condition, and to remain as a remainder ought to do; that is, so as to await the determination of the preceding estate, before it comes into possession.

Plowd. 32.

As if a gift in tail be made to one, upon condition that if he do such an act, *then* the land shall remain to his right heirs; the word *then* is not so to be understood, as to avoid the estate-tail, and execute the fee-simple in possession

possession immediately on performance of the act; but must be taken in this manner, *viz.* that upon performance of the act, the remainder in fee shall *vest* in him, not to be executed in *possession* till the expiration of the estate-tail.

Colthirst v.
Bejushin.
Plowd. 23.
(191)

And accordingly, where there was a lease to husband and wife for their lives, remainder to *B.* their son, and if *B.* died before the husband and wife, *then* to remain to *C.* another of their sons for life; this was held a good remainder to *C.* to take effect in possession after the determination of the preceding estate; but it was agreed, that it would have been void if it had been, that then *from the death of B.*, *C.* should have the lands during the lives of husband and wife, upon the principles before laid down; and because the limitation in the latter case, would operate to the prejudice of others, *viz.* the persons intitled to the particular estate.

Vide Plowd.
32. b.

Cro. Eliz.
360.
Cogan v.
Cogan.

The same law holds, with regard to a subsequent estate, limited to take effect on a condition which is to *defeat* a preceding remainder; as where *A.* seised in fee let to *B.* for life, remainder to *C.* for life; provided that if *A.* should have a son which should live to the age of five years, the estate limited to *C.* should cease, and the land remain to that son
in

in tail; it was adjudged, the estate limited to the son was *void*, because limited on a condition which was to *defeat* the preceding remainder to C.

The last noticed case, I have taken occasion to observe in a former page, seems to go the whole length of the position, that a limitation over at common law, in defeasance or abridgment of a preceding particular estate, in an event that was not a determination of that particular estate in its own nature, has been *judicially* held, *not* to be a *remainder* nor valid as such; this is well illustrated in the observations upon this case, in *Bacon's Abridgment*; which correspond *verbatim* with what is said on the same case, in the manuscript treatise of Lord C. B. *Gilbert* above referred to.

Vide *supra*,
p. 10.

Vol. 4. p.
318.

Supra, p. 58.

The observations are first, That this was properly a condition, because upon the happening thereof it was to *shorten and abridge* the estate before given. Secondly, This case proves the *law to be the same*, in case of things which lie *in grant*, as of those which lie *in livery*; for here it was not the particular estate, that was to cease upon the condition; but the *remainder*, and that lies *in grant*. Thirdly, though the condition here was not annexed

annexed to the first estate, yet it was annexed to the estate immediately *preceding the remainder* to the son; and so to this purpose, *is the same* as if it had been *for life*, upon such condition to *cease and remain over*. Fourthly, it appears, that the remainder was not to begin, but upon the condition performed, and so the condition preceded the vesting the remainder. Fifthly, this case proves, that none shall take advantage of a condition but the lessor and his heirs, and therefore the *remainder to the son* who was a stranger, could *not arise thereby*. Sixthly, that this remainder being limited to begin upon a condition precedent, whereof none can take advantage but the lessor and his heirs, is for ever *defeated and destroyed*; because it cannot take effect according to the terms limited for vesting thereof.

But it may happen, that notwithstanding a contingent limitation, is *expressed to commence* from a period eventually *anterior* to the determination of the particular estate; yet the nature of the case may be such, as not to admit of its taking effect in possession *in restraint, abridgment or exclusion* of the particular estate; as if such limitation over were to the grantee or devisee of the particular estate; which instead of operating in any degree to defeat, exclude or curtail the particular

particular estate, would in effect remove its limits, and open it into a greater estate; in conformity to what was allowable at common law in regard to the enlargement of estates on condition; which limitations so far resembled contingent remainders, as to require the continuance of the particular estate till they vested. And though the limitation should not so far pursue the particular estate *in quality*, as to come within the doctrine of estates to be enlarged on condition; yet if it be such as cannot defeat, exclude or abridge the particular estate, nor have any other operation than if the words expressive of *its time of commencement* had been omitted, or it had been in express words postponed *till after the determination of the preceding estates*, the objection to its effect as *a remainder* does not hold; as it then in effect gives *no more*, than the *remnant* or *residue* expectant on the particular estate, and could not have intitled the grantor or his heir to enter at common law in defeasance of the particular estate; nor operates at all to the prejudice of strangers; which are the reasons assigned against the validity of conditional limitations at common law.

Thus suppose in the case of a lease to two as above cited, the limitation over after *the death of the first of them*, had been to the *survivor* instead of *another*, as the case puts it;
this

this would not have avoided, defeated or abridged the estate of the *survivor*; but actually have embraced it in the afflux of a greater, into which it would have run under the technical term of *merging*, instead of being rescinded or nullified. The grantor or his heir, could have no title to enter and defeat the particular estate; because there was no condition or proviso to make it cease, or carry the estate either expressly or implicatively to any body, *from the devisee* of the particular estate. Nor could the limitation operate to the prejudice of another, *viz.* the person otherwise intitled to the particular estate; because it was to that *very person* himself; and the effect would have been precisely the same, if the limitation had been *and from and after the determination of the estate aforesaid*, then to the survivor in fee.—I therefore discover nothing that would in that case, have prevented the limitation over from operating strictly, as a remainder at common law.

Goodtitle v.
Billington.
Dougl. Rep.
725.

Accordingly in a case, where the testator devised a messuage &c. to his wife and daughter, during the term of their natural lives and the life of the longer liver of them, in equal proportions share and share alike; but in case the daughter should happen to marry and have issue of her body lawfully begotten, then and in that case *after the decease* of his wife,
he

he devised the said messuage &c. unto his daughter and her heirs and assigns for ever; but if his daughter should happen to die single and unmarried, and without issue of her body lawfully begotten, then and in that case, he devised the premisses unto his said wife and her heirs and assigns for ever. The testator left his said wife, and his said daughter who was his heir at law. The widow died, and after her death the daughter suffered a recovery; and the question was, whether the limitation over to the widow and her heirs, was barred by the daughter's recovery.

It was argued first, that the limitation to the daughter in case she should marry and have issue of her body, was not to wait till the natural expiration of the first estate to her; but was to take effect in her life-time, as soon as the contingency on which it was limited should happen, and it was therefore not a remainder but a conditional limitation; that as soon as she had married and had issue, the estate to her and her heirs would have taken effect, and would have enlarged her interest, and merged her estate for life.—Secondly, That if the said limitation to the daughter should be a remainder, there were subsequent words which seemed to indicate an intention, only to give the daughter an estate tail by it; and then the limitation over to the wife would be
a vested

a vested remainder, and of course not barred by the recovery.—To this it was answered, that whether the daughter took at first an estate-tail, or only an estate for life, the remainder to the widow was barred by the recovery—that if she took an estate-tail the case was clear, but if she only took an estate for life, then the limitation to the widow was upon a contingency with double aspect, it was a concurrent remainder in fee, created in the alternative with a contingent remainder in fee to the daughter; and a recovery having been suffered by the tenant for life, every body was barred but the heir at law, which the daughter herself was—that the second limitation to the daughter was capable of taking effect as a contingent remainder in fee, and of course, that to the widow was so. And it was an established maxim that whenever an estate can take effect as a remainder, it shall not be construed an executory devise.

Vide *infra*,
299. et seq.

Lord *Mansfield*, in delivering the opinion of the court said, *it was perfectly clear and settled*, that where an estate can take effect as a remainder, it shall *never* be construed to be an executory devise or springing use. The limitation was to two persons and the survivor, so that a preceding freehold *would be in the survivor*; and the estate over was limited on a contingency upon which a remainder might depend. It was to the daughter and her heirs

heirs (not issue) if she should marry, and have issue; and it must have taken effect after the death of the survivor. There was another contingency, on the event of the daughter dying unmarried, and without issue (not failure of issue), and upon that event the limitation was to the widow in fee. But that the tenant for life, by the recovery, had barred the contingent remainders.

The determination in the last stated case, gave occasion to those observations by Mr. Douglas, to which I have paid some attention Supra, p. 10. in an early page of this treatise, respecting the distinction, between mere *conditional limitations*, and *remainders*, in the strict sense of the word; and from that determination he seemed to think, the intrinsic inefficacy of such distinction might be collected.

But where is the ground for such an inference, unless it be the argument attempted at the bar, against the validity of the disputed limitation on the supposed application of the distinction in question?—an argument which does not appear to have claimed the attention of the court, because not born out by the circumstances of the case itself. The court did not, according to the report of the case, suggest one syllable, in reprobation of the nature of the distinction referred to, and attempted

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tempted in the arguments; but merely treated the ulterior limitations as *remainders*. Is not therefore the inference, at least, as fair, that they held the case *not within the distinction* alluded to, as that they denied the merit *of the distinction itself*; until it be shewn that it really applied to the circumstances of the case?

Now to see how far it so applied, we are to consider, that here was a particular estate of freehold to the wife and daughter for their lives, and the life of the survivor: (I observe indeed the words *in equal proportions, share and share alike*, sounding like a tenancy in common, but those I find did not influence the case, as the court said the *freehold would be in the survivor*). The *remnant* or *residue* therefore, after what was included in such estate, was the *inheritance in fee*, expectant on any determination of such estate, incidental to its original nature; but the limitation *in dispute, viz.* the devise in fee to the wife, in the event of the daughter's dying unmarried and without issue, had no tendency, even in *expression*, to defeat, abridge, or exclude the particular estate, any more than a devise to her in fee after the decease of the survivor.—What, therefore, prevented *that limitation* from operating as a *remainder*? or how could the distinction in question possibly apply to it? The deciding *that* to be a *remainder*, implied no sort of denial of a distinction, which clearly
affirmed

affirmed it. And if so, the determination in that case, upon the real point before the court, does not afford the inference alluded to.

But the arguments at the bar, and the opinion of the court, were not confined to that point; they equally reached the contingent estate limited to the daughter; which it was contended at the bar, was not to wait till the natural expiration of the first estate for life to her, but was to *take effect* in her life time, as soon as the contingency on which it was limited should happen; that as soon as she had married, and had issue, the estate to her and her heirs would have *taken effect*, and would have enlarged her interest, and merged her estate for life. Now if by *taking effect* here, is meant merely *vesting*, the position is true in its full extent; and that sort of taking effect, is no more than what happens, in every instance of a contingent remainder, upon the seasonable arrival of the contingency on which it is limited. But if by taking effect, is meant *in possession*, it could not do so at all, during the *life of the wife*, because the limitation was not to take effect till *after her decease*, as Mr. Justice Buller very properly observed in the course of the argument. And if the event had happened after the death of the wife, when the daughter was sole tenant for life, then would the limitation to her have

taken effect in possession, *not* in *abridgment*, *restraint*, *defeazance*, or *prejudice* of her estate for life, but would only, by its accession thereto, have involved it in the confluent fee; and though her former estate would have been extinguished in regard to its limits, yet would it have had a virtual continuance, and flowed in a stream of coalescence with the inheritance. It would not have been extruded, or even determined by any means collateral to its own nature; but merely have undergone a sort of specific modification, or change, incidental to its original nature, *viz.* *merger* in its union with the remainder; an effect which must have happened, in respect of the *mother's estate*, if the daughter had died unmarried, and without issue in her lifetime; and, what is more, the very limitation to the daughter, would have had the very same effect, if the words *after the decease of my said wife*, had been omitted; or even the words, *from and after the determination of the estates aforesaid, and not before*, had been inserted in their stead. Could the limitation under that shape, have afforded the most remote idea, of any thing but a *remainder* in the strict sense of the word? and what alteration in its nature, could arise from the insertion of words, which could under no possible construction in any event vary its effect? What then was there to prevent its being a remainder?

der? and how could the court's, considering it in that *light*, afford any inference against the validity of a distinction, which ranked it under that description?

I have considered the above case, independently of the circumstance of the daughter's being heir at law of the testator; as I think the same reasoning, in regard to the construction or effect of the limitations, would equally have applied, if a stranger had stood in the daughter's place—I mean, stood so in respect to *all* the limitations in which she was concerned; for if only the second limitation to her upon her marriage, and having issue, had been to a stranger instead of herself, to take effect *after the decease of the wife*; as that would eventually have precluded the first estate in the daughter *from the wife's decease*, it would have brought it within the distinction between *conditional limitations* and *remainders*; and made it resemble the case above cited from *Plowden*, of a lease to two, the remainder *over in fee after the decease of the first of them*. Vide Plowd. 24. 2.

We may next notice a distinction, between the cases, where a subsequent estate at common law, is limited to take effect *upon* a condition which is to defeat the preceding estate; and other cases where the preceding estate is

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Roll. Abr.
Cond. (l. d.)
pl. 3.
pl. 4. (P. d.)
pl. 2. pl. 9.
Brook Cond.
pl. 111.
Bac. Abr. 4.
319.

limited, subject to a condition, but the remainder is limited without any relation to or dependence at all upon that condition. In the first cases we have seen the condition makes the subsequent limitation void; but in the latter it seems the remainder destroys the condition: as if a man lease to *A.* for life upon condition, remainder over, *Rolle* says the condition is destroyed.

Now in these cases, though the remainder is not intended to be affected, by the condition annexed to the particular estate; yet if that condition were good, the grantor's entry for breach of it, would defeat the remainder, upon the principles before laid down.— But it is unreasonable, that the grantor should defeat that estate in remainder, which he had absolutely granted away. Indeed it seems directly within the reason of the case put by *Littleton*; that if a man lease for life upon condition of re-entry for default of payment of rent, and the lessor afterwards grants his reversion, the lessor or his heirs cannot enter, because he hath aliened the reversion: so in the above case, the lessor by limiting the remainder over absolutely, hath departed with the reversion, as much as if he had afterwards aliened it by another conveyance.

Lit. f. 347.
Vide Perk.
f. 831.

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I have not met with any case determined expressly upon this point, where the limitation was by conveyance at common law; and where the limitation was by devise, there seems formerly to have been some difference in our books. Some took a distinction upon this principle; that though in the case of a conveyance at common law, the entry for condition broken must defeat the livery, and of course the remainder which took effect from it; and therefore the remainder in that case, when limited without dependence on the condition, should be construed to destroy the condition annexed to the preceding estate: yet, that in case of a devise, where the estates took effect without livery, there was not the same reason, that the entry for the condition broken should destroy the remainder; but that such entry might in that case affect only the particular estate, and the remainder nevertheless take place at the time limited for it to commence; and therefore the remainder need not absolutely destroy the condition; but that the heir should enter for breach of the condition, and retain only till the remainder should take place: whilst others considered the condition, in the case of a devise, absolutely destroyed by the remainder over, no less than in the case of conveyance at common law.

(193)

Brook Cond.
p. 111.
Perk. f. 563.
Dyer 127.

Plow. 412.
10 Co. 41.

Dyer 127.
10 Rep. 41. b.
Dr. Butt's
case.

(194)

As where a testator, having issue three sons, devised lands to his wife for her life *sub conditione quod ipsa educabit pueros testatoris in bonis moribus*, the remainder to the second son in tail, and the reversion descended to his eldest son. The condition was broken: the question was, whether the heir should enter for the condition, or the son in remainder should enter as for breach of a limitation, or the condition be destroyed by the limitation over. And the court resolved that it was not a limitation; because there were express words of condition, and the meaning of the testator was, that his heir, who always is to take advantage of a condition, should enter and defeat the estate of the wife: but his meaning did not accord with the law; for he could not defeat the estate for life without defeating the remainder; and therefore by the limitation of the remainder over the condition was destroyed.

Skirne v.
Bond. 1 Roll.
Abr. Cond.
(K.) pl. 6.

It is true, that in a subsequent case, where a testator devised to one in tail, upon condition that he should not alien, and that if he died without issue it should remain over to another in fee; the devisee aliened; and *Coke* and *Warburton* held it to be not a limitation but a condition, for which the heir should enter.

But

But whatever differences of opinion formerly existed in regard to this matter, they are now no more; for that question has long since ceased; and it seems now agreed, that wherever in a devise a condition is annexed to a preceding estate, and upon the breach or non-performance, the estate is devised over to another, that condition shall operate as a *limitation*, circumscribing the continuance and measure of the first estate; and that upon the breach or performance of it (as the case may be) the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence *in possession*, and the person claiming under it, whether heir or stranger, shall have *immediate* right to the estate. Thus indeed is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger; and enforcing the performance of the condition, by the determination of the preceding estate upon the breach of it; notwithstanding that preceding estate be limited to the heir himself. And limitations of this sort are properly called conditional limitations.

Vide Plowd.
408. Scholastica's case,
and 3 Rep.
20. b. 21. a.
Welcock v.
Hammond.

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Large's case,
2 Leon. 82.
Rundale v.
Ely, Cart.
175.

As, where one devised lands to his mother for life, and after her death to his brother in fee; provided that if his wife (being then *enfeint*) be delivered of a son, that then the land should

Dyer 127.
in margin.

And vid. Dyer 33. a. in
Marg. Cro.
Ja. 592.
Palm. 135.

1 Ventr. 199.
Lady Anne
Fry's case.

should remain to him in fee; the testator died, a son was born; and it was held that the fee of the brother should cease, and vest in the son upon the happening of the contingency.— Again, where *A.* devised lands to his wife for life, and after her death to his grandchild *B.* and the heirs of her body; *provided always and upon condition* that she married with the consent of *D. E.* and *F.* or the major part of them, and in case she should marry without such consent, or die without issue, then he devised the premises to *C.* (neither *B.* nor *C.* being heir at law to the testator.) After the testator's death *B.* married without the consent of any of the persons named for that purpose; and it was clearly held to be an estate to *B.* till she married without such consent; that here was an estate tail devised to *B.* subject to two limitations, the one in law, *viz.* dying without issue, the other express, and in fact, *viz.* marrying without consent; which was properly a *conditional limitation*, and not a condition: for if it were a condition, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed that the marriage without consent determined her estate-tail, and cast the *possession* immediately on *C.*

So

So where one devised lands to *A.* his heir at law, and other lands to *B.* in fee, and that if *A.* molested *B.* by suit or otherwise, he should lose what was devised to him, and it should go to *B.* After the testator's death *A.* entered on the lands devised to *B.* and claimed them; and it was held that this was a sufficient breach to give title to *B.*, and that the condition imposed on the heir, should not be taken as a condition; because, if so, by descending on him who alone could enter for the breach of it, it would in this case be fruitless and defeated; but it was held to be a *limitation* which determined the heir's estate, and cast the possession on *B.* without entry.

Shuttleworth
v. Barber.
2 Mod. 7.

But where there is no express limitation over, to take effect upon the breach or performance of the condition, annexed to a preceding estate; there it seems the condition or proviso is not always construed as a conditional limitation; but the construction in that case is governed by the apparent intent of the testator, as in the case of *Gulliver v. Shuckburgh Abbey* cited hereafter.

Infra p. 311.

Therefore, when it is said that a subsequent estate limited on a condition, which is to defeat a preceding estate is void; the rule must be understood only of estates limited in *conveyances at common law*; for that such a limitation

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tion over may be good by way of *devise*, is clear from the cases last cited; and will further appear in the chapter of executory devises; to which these sort of limitations, in those cases where the whole fee is first devised to a person *in esse* are to be referred; and limitations of this nature may also take effect by way of *use*, for a use may be limited to cease as to one person upon a future event, and to vest in another.

Dyer 314.
pl. 96. Moor
99. pl. 243.
and Ley 54.

As if a man makes a feoffment in fee to the use of *W.* and his heirs till *A.* pay 40 *l.* to the said *W.* and then to the use of the said *A.* and his heirs, and the statute executes the estate in *W.* and afterwards *A.* pays the 40 *l.* there *A.* is seised in fee if he enters, by the opinion of several; but by some, *A.* shall not be seised in fee by the said payment, unless the feoffees enter; therefore it seems to be the surest way to enter in the name of the feoffees and his own name; and therefore it appears that if a man at this day makes a feoffment to uses, that the use shall change from one to another by act *ex post facto*, by circumstance, as well as it would before the statute 27 *H.* 8. of uses. Such are the words of *Brook* in the place I have cited.

Brook Feoff.
al' Uses, pl.
30.

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So where *A.* tenant in tail, by indenture bargained and sold the lands to the use of *J. S.*
in

in fee; in the indenture was a letter of attorney to make livery, which was made accordingly; *J. S.* by the same indenture covenanted, that if *A.* before such a day paid 40*s.* to *J. S.* that then *J. S.* and his heirs should stand seised, &c. to the use of *A.* and his heirs; and if *A.* did not pay, &c. then if the said *J. S.* did not pay to the said *A.* within four days after 10*l.* that *J. S.* and his heirs should thenceforth be seised to the use of the said *A.* and his heirs &c. and *A.* covenanted for further assurance; both failed of payment, *A.* levies a fine to *J. S.* without any consideration. It was adjudged a good feoffment well executed by the livery, notwithstanding the words of bargain and sale only; and that the covenant to be seised to the new uses conditionally upon the payment and non-payment, being in one and the same deed, should raise the use upon the contingency according to the limitation of it.

Leon. 25.
pl. 31.
Benicombe
v. Parker.

In another case where *A.* tenant for life, and *R.* in reversion in fee, covenanted to levy a fine to the use of *A.* and his heirs, if *R.* did not pay 10*s.* to him at a certain day; and if he did pay it, *then* to the use of *A.* for life, remainder to *R.* in fee; it was held that *A.* had an estate in fee *till* *R.* paid the 10*s.* at the time; and the limitation to the use of *A.* for life and *R.* in fee, was to arise on a *condition*

Spring v.
Cæsar.
1 Roll. Abr.
415.
pl. 12.
Jo. 389.

dition subsequent, viz. the payment of the money at the time. In regard to this condition *subsequent*, we may observe, that it was evidently the intent, that one of the limitations should take effect immediately; that to *A.* for life with remainder to *R.* in fee *could not*, till the payment of the money; therefore it must be the first to *A.* in fee.

Cro. Eliz.
439.
Woodliff v.
Drury.

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And where after a feoffment, to the use of the feoffor and *A.* his feme *that should be* after their marriage, and the heirs of their bodies; the feoffor took *A.* in marriage; all the judges held, that although he were seised in fee in the mean time, yet, by the marriage, the new use should arise and vest, if there were no act in the mean time to destroy that future use, (as it was in *Chudleigh's* case) and judgment was given accordingly.

Loyd v. Carew, Prec. in Canc. 72.
Show. Cases in Parl. 137.

So where *A.* and *B.* two sisters, in consideration of 4000 *l.* paid to *A.* by *C.* conveyed lands by lease and release to the use of *B.* and *C.* for their lives (upon their intended intermarriage) remainder to their first and other sons in tail-male successively, remainder to the daughters of *B.* and *C.* in tail, remainder to the right heirs of *C.* Provided that if there should be no issue of *B.* and *C.* *living at the decease of the survivor of them*, and that the heirs of *B.* should within twelve months after

the death of *B.* and *C.* dying without issue as *aforsaid*, pay to the heirs or assigns of *C.* 4000 *l.* then the remainder in fee so limited to *C.* should cease, and the lands should remain to the right heirs of *B.* for ever. Afterwards *B.* and *C.* for extinguishing all right and title of *B.* and her heirs under this proviso, levied a fine of the lands to the use of *C.* and his heirs. *B.* and *C.* died without issue, and the heir of *B.* filed a bill against the heir of *C.* to have a conveyance of the lands upon payment of the 4000 *l.* pursuant to the proviso. The bill was dismissed; but upon an appeal brought in parliament, the decree of dismissal was reversed; upon its being alleged that the proviso was not void, it being within the reason of the limitations allowed in the Duke of *Norfolk's* case, where it is said, that future interests, springing trusts, or trusts executory, and remainders that are to arise upon contingencies are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will speedily wear out. And that the fine could not bar the proviso, because the same land never was nor *could be* in *B.* who levied it.

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Vide infra.
P. 353.

And vide
Smith v.
Warren.
Cro. Eliz.
688.

It is to be observed, that the *new use* in this case to the heir of *B.*, was not a limitation which could unite with that to the ancestor,

cestor, according to the rule in *Shelley's case*; for it was not a *remainder* to arise upon the *determination* of the preceding estate, but was a *conditional limitation* of a future use; whereas that rule applies only to *remainders*; therefore the land vested in *B.*'s heir by *purchase* and not by *descent*. There are other cases relative to this doctrine which I shall refer to the head of Executory Devises.

Vide Nicholls
v. Sheffield
et al'.
2 Brown
Canc. Caf.
215. and
other cases
noticed infra.
p. 321.

The uses I have been speaking of are called *shifting* or *secondary uses*; and are allowed, (within the limits established for avoiding perpetuities) because they were good before the statute 27 Hen. 8. of uses, (when uses were fiduciary and totally distinct from the *legal* estate, which at common law could not be limited in such manner,) and do not fall within any of the mischiefs which that statute was made to remedy.

It appears, however, to have been a question, whether limitations of this nature were good in surrenders of *copyhold* estates. Thus, where there was a surrender *habendum* from the death of the surrenderor, to the use of his child then *in ventre sa mere* and his heirs and assigns for ever, and if the child die before age or marriage, then to the use of *J. S.* and his heirs and assigns. *Croke* says it was resolved, that the surrender to the use of *J. S.*

Sympton v.
Sothorn.
Cro. Jac.
376.

was

was void, for that a man could not make such a *conditional surrender* to operate in *future*. On the other hand, the same case as reported by *Rolle*, is cited in *Lex Custumaria* as an authority that such future uses are good, and that a fee may be limited on a fee upon a *contingency* in *copyhold* estates. And this the case in *Roll's Abridgment* seems to leave undecided. But in *Gilbert's Tenures* it is said, that such a resolution seems not to be grounded on so good reason, as the contrary resolution in *Croke*; for the use upon a surrender of a copyhold is not like a use or trust at common law: but he who is admitted upon a surrender, is admitted to the legal *customary* estate, and is not seised to a *use*; therefore uses upon surrenders are in general governed entirely by the same rules, as conveyances at common law, in which such limitations were not allowable; and that upon this principle it seems a fee upon a fee in case of a surrender of copyholds is not good, any more than in a conveyance at common law. But the above opinion of *Gilbert* is, I think, excluded by decided cases; for the validity of conditional limitations in surrenders of copyholds, appears to have been admitted in the above cited case of *Stocker v. Edwards* or *Edwards v. Hammond*. And the decision in the case of *Sympson v. Sothorn*, may be referred to the point of the *habendum*

(201)

Lex Cust.
121.
1 Roll. Rep.
109. 138.
252.
2 Roll. Abr.
791. P. pl. 2.
(S.) pl. 8.
Gilb. Ten.
244.

Vide supra
P. 173.
And vide
Welcock v.
Hammond.
Cited 3 Co.
Rep. 20. b.
Brian v.
Cawfen.
3 Leon. 115.

Cro. Eliz.
361.

after the death of the surrenderor being void, taking that as the *conditional future operation*, which was denied to the surrender. And in the case of *Paulter v. Cornbill, Beamond*, Justice, conceived the limitation of a fee upon a fee, as good in surrenders of copyholds, as in uses of lands upon a feoffment.

See a note by Mr. Watkins in Mr. Gwillim's edition of the New Abr. tit. remainder vol. 5 p. 779.

Bently v.
Delamore.
1 Freem.
267, 268.
And vide
Carth. Read-
ing, 31, 32.
for the same
point.
And vide
Taylor v.
Taylor.
1 Atk. 386.

So in the case of a surrender of copyholds, to the intent the lord should admit *A.* whom the surrenderor intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and *A.* in tail; the whole court of *C. B.* held that it was good enough to limit a remainder upon a contingent fee in copyholds; as in case of mortgages of copyholds a surrender *in futuro* is good, for the freehold remains in the lord.

Burton's case,
Moor 742.
pl. 1022.
Law of Uses,
138.

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But there are some instances of freehold estates, wherein this sort of uses has not been admitted to take effect; as where a feoffment was to the use of *A.* for life, remainder to his wife for life, remainder to his right heirs; with a proviso, that if his son interrupted his wife, it should be to the use of his wife and her heirs; *A.* made a lease for years to commence after the death of his wife, and died, the son disturbed the wife, and it was resolved that the uses would not arise

to

to give the wife the fee. The reason of this case seems doubtful and obscure; however, the lease for years made to commence after the death of the wife, is said to have been the occasion of the judgment; for that the reversion after the death of the wife being altered by that lease, the same use in the reversion which was in being at the disposition of the particular estate, and so conditionally limited to the wife, could not arise to her, and that therefore the use could never arise at all.

If a limitation be to the use of *A.* and his heirs, provided that if he give a mortal blow to any person, that the use shall cease to him, and shall be to another; this is fraudulent to prevent an escheat, and therefore is void.

Moor 633.
pl. 868.

And where *A.* bargained and sold land to *B.* for 500*l.* upon condition that if *A.* paid *B.* 500*l.* he might re-enter, and be seised to the use of himself and his heirs, until he should attempt to alien without the assent of *B.* and then to the use of *B.* and his heirs; and a fine was levied to those uses; *A.* paid the 500*l.* and entered, afterwards *A.* aliened without the assent of *B.* *Per* Lord Chancellor *Egerton*, No use will arise to *B.* the bargainee, because the bargainor, entering

Moor 761.
pl. 1054.
Holloway v.
Pollard.

(203)

for the condition, ought to be in of the old use and estate, and cannot be seised to any other use; also the fine was levied to *B.* by which *A.* who was the conusor, and also the bargainor, who came in by the use of the fine, cannot stand seised to any other use, for then there would be use upon use.—But we are to observe the judgments in these last cases, depended on the particular nature of circumstances *ex post facto*, or on the fraudulent intent or illegality of the condition; and do not in the least affect the general validity of these shifting limitations.

There is also a limitation of another kind, which may be considered as an exception to the rule at common law, that an estate limited to take effect on a condition, which is to affect the particular estate, is void. I mean those cases, where a particular estate is limited with a condition, that after the performance of such an act, or the happening of such an event, the person to whom the first estate was limited, shall thereupon have a larger estate. For it was resolved in the case of *Lord Stafford*, that such a grant may be good, as well of things which lie *in grant*, as of things which lie *in livery*; and may be annexed as well to an estate-tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater

8 Rep. 74.
in *Lord Stafford's* case.

greater estate. But that such increase of an estate by force of such a condition, ought to have four incidents.

1st, There ought to be a particular estate as a foundation for the increase to take effect upon; which particular estate Lord Coke held must not be an estate at will, nor revocable, nor contingent. — 2^{dly}, Such particular estate ought to continue in the lessee, or the grantee until the increase happens, without any alteration of privity in estate, by alienation of the lessee or grantee; though the alienation of the lessor or grantor will not at all affect it; and that the alteration of persons, by descent of the reversion to the heirs of the grantor or his alienee, or of the particular estate to the representatives of the grantee, shall not avoid the condition; and that where the grantee dies before performance of the condition, his heir shall, after he has performed the condition, be in *quodam modo* by descent: and that such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail to some body else. — 3^{dly}, That the increase must vest and take effect, immediately upon the performance of the condition; for that if an estate cannot be enlarged at the very instant of time ap-

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pointed for enlargement, the enlargement shall never take place; and therefore though the reversion be in the king, it shall instantly be out of him, upon performance of the condition, and vest in the grantee, without petition or *monstrans de droit* or other circumstance; for the awaiting such circumstances, would frustrate and defeat the enlargement; and the law will never require circumstances to subvert the substance.—*4thly*, That the particular estate, and the increase ought to take effect by one and the same instrument or deed, or by several deeds delivered at one and the same time; (which, in effect, is the same thing, for *quæ incontinenti fiunt inesse videntur*) because the particular estate, and the increase thereupon, is only a grant to take effect out of one and the same root; and though the increase vest at a different time, yet when it is vested, it has its force and effect from the same grant. For a more minute discussion of this doctrine, I shall refer the reader to Lord Coke's report of the said case of Lord Stafford. *Vid.* also *Sheppard's Touchstone of Common Assurances*, fol. 129. where another requisite is mentioned, the condition being *possible* and *lawful*, as is observed by the learned Editor of the last improved edition of that book,

Of the Estate necessary to support a (206) Contingent Remainder.

I Shall now consider what estate is required to support a contingent remainder; or, in other words, what kind of estate must necessarily precede it.

It is a general rule, that wherever an estate in *contingent remainder* amounts to a freehold, some *vested* estate of *freehold* must precede it. This rule depends upon the necessity there is for the freehold to pass out of the grantor, at the time the remainder is created. If no freehold passes, how is the remainder-man to have it? If it passes at all, it must pass either in the particular estate, or in some remainder limited after it; in a *contingent* remainder it cannot pass, because such remainder at the time of its creation passeth to or vests in nobody; and if it passeth only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever rising at all; for that freehold then becomes *vested in possession*, which the contingent estate was limited to precede; and of course there is no room left for the introduction of the contingent freehold. It follows, therefore, that some preceding *vested* estate of freehold must be

1 Rep. 130.
a. 134. b.
Vide also
Boraston's
case,
3 Rep. 20.
Co. Lit. 217.
a.

(207)

limited, to give existence to such a *contingent* remainder.

1 Salk. 226.
Goodright
v. Cornish.

Thus, where a devise was to *B.* for fifty years if he should so long live, remainder to the heirs of the body of *B.* remainder to *C.*; the limitation to the *heirs of the body* of *B.* was void as a *remainder* for want of a freehold to support it.

1 Salk. 229.
Scatterwood
v. Edge.
Supra. p.
163.

So where there was a devise to trustees for eleven years, and then to the first son of *A.* in tail, &c. and *A.* had no son at that time, it was agreed that such limitation was void as a *contingent remainder*, because there was no freehold to support it.

2 Vern. 754.
Elie v. Os-
burn.

And vide
Doe v. Mor-
gan, infra, p.
236.

But where an estate was limited to *A.* for ninety-nine years if he should so long live, remainder to trustees during the life of *A.* remainder to the wife for her jointure, remainder to the heirs of the body of *A.*; there, though the particular estate was but for years, yet the contingent remainder to the heirs of the body of *A.* was good, because preceded by a *vested* freehold remainder to the trustees.

Sir Thomas
Palmer's case.
Moor 815.

There is a case indeed reported by *Moor*, where *A.* covenanted to stand seised to the use of himself for life, remainder to *B.* his brother's

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brother's eldest son for life, remainder to the first son of *B.* in tail, and so on to his eighth son, remainder to the right heirs of *A.* *A.* was afterwards attainted of treason, and executed before the birth of any son of *B.* and it was resolved, that by the attainder of *A.* the afterborn sons of *B.* were barred, and that the crown had the fee-simple discharged of all the remainders limited to sons not then born.—

And the question arises how we are to reconcile this resolution with the principle that *any preceding vested freehold* estate will support a contingent remainder; for here, whatever effect the forfeiture of *A.*'s estate for life and remainder in fee, might otherwise have had, yet as *B.* had a *vested* freehold, why was not that capable of supporting the contingent remainder to his sons? There are no reasons

given for the resolution in this case; and perhaps to account for it, we are to recur to the supposed necessity (herein after treated of)

of a *seisin* in the feoffees, covenantees, &c. to serve contingent uses, when they come *in esse*; which principle admitted, it may be inferred, (as it seems agreed that the crown cannot stand seised *to a use*) that there could be no *seisin* (after *B.*'s forfeiture to the crown) to serve the contingent uses to *B.*'s sons, when they came *in esse*, and that on that account they could never take effect. But I shall endeavour to shew in a subsequent part of this essay,

Vide infra,
p. 216.

essay, what sort of reliance is to be had on this principle.

(209)
Corbet v.
Tickborn.
2 Salk. 576.

If there had been an office found antecedent to the birth of a son of *B.* that *A.* was seised in fee, it might have accounted for the resolution in the above case, by taking away the *right of entry* of *B.* according to the distinction I shall notice after the next cited case. But abstracted from a circumstance of that nature, which does not appear in the report of Sir *Thomas Palmer's* case, that of *Corbet v. Tickborn*, of much later date, seems to claim our better attention. It was a case where *J. S.* being tenant for life, remainder to his wife for life, remainder to his first and other sons, &c. in tail, remainder to himself in fee, committed treason, and afterwards had a son, and then was attainted; and upon a trial at bar in *K. B.* the court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the lands vesting in the crown during the life of *J. S.* because of the wife's estate, (*viz.* a vested estate of freehold in remainder) which was sufficient to support it. For this estate of the wife, it seems, was not turned to a right, or affected by the forfeiture of the husband, nor the crown thereby in possession of any other estate than what *J. S.* was intitled to at the time; as appears by another case,

case, where tenant for life, remainder to his first son in tail, remainder to J. S. in fee, was attainted of high treason, and died without issue. And upon its being urged, that the whole estate vesting in the king by 33 H. 8. c. 8. without any office finding the special matter, he in remainder, could not enter, any more than if a general office had been found, which would have supposed a fee. It was held, that no other estate vested in the king by the said act, than the party attainted had; just as if a *special* office had been found; and therefore the remainderman might enter on the king, the king's estate being determined. For the statute saved the right of others; tho' it was otherwise where an office found an estate in fee in the party attainted.

Linch v.
Coote, 2
Salk. 469.

Here we are to observe, that the rule respecting the estate, requisite to support a contingent *remainder*, holds equally in the limitation of *uses*, as in estates executed in possession *at common law*: tho' indeed before the statute of uses, if there had been a feoffment to the use of A. for years, remainder (of the use) in contingency, the contingent use would have been good, for the feoffees remained tenants of the legal freehold; but since that statute it is otherwise, for now no estate remains in the feoffees.

1 Rep. 134.
—5.—8.
Show Caf.
Parl. 107.

(210)

Therefore,

2 Salk. 679.
Adams v.
Savage.
Vid. supra,
p. 40.

Therefore, where there was a lease and release by *A.* to trustees and their heirs, to the use of *A.* for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs male of the body of *A.* the court held this limitation to the heirs male of the body of *A.* to be void, because there was no preceding estate of freehold limited to support it. The question in this case is stated to have been, whether *A.* was tenant in tail, or only tenant for years. Now the latter conclusion must have prevailed even if the limitation to the heirs male of his body, tho' void as a remainder, had been admitted effectual as a future use within the reason of the cases put by *Holt.*

12 Mod. 39.

Davies v.
Speed. 4
Mod. 153.
 2 Salk. 675.
Carth 262.
 12 Mod. 39.
Show. Cal.
Parl. 104.

So where the husband and wife covenanted to levy a fine of the wife's lands to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the *right heirs* of the husband, they had issue that died in their life-time; afterwards the wife died, leaving the husband, and after the death of the husband the limitation to his heirs was held void for want of a preceding freehold to support it. In this case we are to observe, the husband could not take an estate for life by implication; because the estate was the wife's, and moved originally from her; and supposing an estate for life in the wife by implication

Vide supra,
p. 42.

plication or resulting use, capable of supporting the use to the heirs of the body of the husband on the wife; yet as she, as well as their issue, died in the husband's life time, before the limitation to his *right heirs* could vest, *that* must have failed as a contingent remainder, for want of a subsisting particular estate at his death to support it. And there was no sort of ground to maintain its validity as a future use; as it was postponed to a general failure of heirs of the body of the husband by the wife; which was too remote.

Vide *infra*,
321.

As to a contingent remainder for years, there does not appear to be any necessity for a preceding *freehold* to support it. For the remainder not being *freehold*, no such estate appears requisite to pass out of the grantor, in order to give effect to a remainder of that sort.

Indeed in the case of *Corbet v. Stone*, where *A.* by indenture, leased to trustees for 40 years, if *A.* should so long live, in trust for *A.* to receive the profits during her life, and that *after her decease*, one moiety should be to *D.* and the other moiety to *E.* (no parties to the deed) their executors, administrators and assigns, severally and respectively, for the term of 1000 years. *A.* afterwards levied a fine to different uses, and died, and five years passed

(211.)
Raym. 140.
Corbet v.
Stone.

passed after her death, and the plaintiff claimed under *D.* and *E.* and entered: it was insisted, that the limitation to *D.* and *E.* was a remainder, though contingent as limited after the death of *A.*, before which the preceding estate for forty years might determine; the court objected that it could not pass as a present estate, because *D.* and *E.* were not parties to the deed, and that it could not be a contingent remainder, being a remainder for years depending on an estate for years; and that there could not be a contingent estate for years; because a lease for years operates by way of contract, and therefore the particular estate and the remainder operate as two distinct estates grounded upon several contracts.—But *quære* of this opinion, for it seems not well considered; nor indeed did the court appear to rely upon it, when they said, admitting the term of 1000 years a contingent remainder, it was barred by the fine and 5 years non-claim, after the time of vesting; and the judgment, which was for the plaintiff, may be accounted for on other grounds, *viz.* her having the freehold and reversion in herself, upon which the fine might operate without tort, and her being only tenant at will, as to the *possession*, to her own trustees of the term of 40 years.

And vide
3 Leon. 23.
in Cranmer's
case.

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Although every contingent freehold remainder must be supported by a preceding freehold,

freehold, yet it is not necessary, that such preceding estate continue in the *actual seisin* of its *rightful* tenant; it is sufficient, if there subsists a right to such preceding estate, at the time the remainder should vest; provided such right be a right of *entry*, and not a right of *action* only; for whilst a right of entry remains there can be no doubt but the same estate continues; since the right of entry can exist only in consequence of the subsistence of the estate; but when the *right of entry* is gone, and nothing but a *right of action* remains, it then becomes a question in law whether the same estate continues or not; for the action is nothing more than the means of deciding this question. Another estate is in the meantime acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought.

Thus if *A.* be tenant for life with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the *right of entry* of tenant for life will support the contingent remainders; but in this case if the contingent remainder does not vest, before such a descent be cast as will take away the entry of tenant for life within the statute of *H. 8. c. 33.* and drive him to his action, then is the contingent remainder gone; because

12 Mod. 174.
In the case of
Thomson
v. Leach.
and vide
Loyd v.
Brooking,
infra, 248.

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cause there no longer subsists any *right of entry* to support it, that right being turned into a *right of action*.

1 Rep. 135.

So where a gift in tail was to *A.* remainder to the right heirs of *B.* *A.* made a feoffment in fee, and afterwards *B.* died; the right heir of *B.* was not intitled to the estate, because there was no particular estate either *in esse* or *in right* to support the remainder when it fell; for *A.* had no right against his own feoffment; nor had his issue right till after his death; and then a *right of action* only, his feoffment having worked a *discontinuance*; but (said Chief Justice *Charleton*) if tenant in tail be disseised and dieth, the same shall not take away the right of the contingent remainder; for there the *right* of the particular estate remaineth in *disseisee*, and supports the contingent remainder.

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So where *A.* covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life; remainder to the use of her first son in tail, and so to the use of her other sons successively in tail, reversion to the use of his own right heirs; and afterwards he granted the reversion *without consideration*, reciting the former settlement; and after that he made a feoffment of the lands; then the daughter

daughter had issue a son; *A.* died, the wife entered, then the daughter died, and then the wife; it was resolved that the grant did not hinder the arising of the contingent uses, because it was without consideration; and the first uses and estates were recited in the grant, so that the grantee had notice, and therefore took the lands subject to the grantor's covenant to stand seised; and that the feoffment did not destroy the contingent estate, because the *right* of remainder for life in the daughter, upon which she might have entered for the forfeiture, did support it; for the feoffment of *A.* was a forfeiture of his estate for life, and of the estate of his wife in remainder during the coverture; so that the daughter might have entered for the forfeiture during the coverture; and this *right of entry* was sufficient to support the contingent remainder to the first son &c. without question.— But it was held by *Glyn Ch. J.* that if, in this case, the feoffment had been made before any grant of the reversion, the contingent use would have been destroyed, notwithstanding the right of entry in the daughter; the ground of which opinion will be explained in a subsequent page of this tract.

2 Roll. Ab.
796. pl. 11.
Wegg v.
Villers. This
was the case
of a settle-
ment by Sir
Edward Coke
Vide 2 Sid.
64. 98. 129.
157.
Heyns v.
Villers.

And vide
Smith v.
Belly, 2 Roll.
Abr. 793—4

Vide 2 Sid.
159.

Vide infra,
p. 219.

This right of entry to support a contingent remainder, must be a *present* right, a *future* one will not do; it must also precede the

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1 Vent. 189.
Lord Raym.
316. infra
242.

Et supra,
242-3.

contingency, and be actually existing when that happens; for if it only *commences* at the *same instant* with it, the remainder it seems will not vest: according to what was observed in the above cited case of *Wegg v. Villers*; where the court said, that the case would have been more dubious, if the daughter had not had an estate for life, but the contingent remainders had depended on the estate of the wife immediately; where the feoffment of the baron had destroyed them; inasmuch as the feoffment of the baron passed his estate and the estate of his wife during the coverture, so that none could enter during the coverture; and neither the estate of the baron nor of the wife could be *in esse*, during this time, to support the contingent uses; for it seems the future right of the wife to enter after the death of the baron, is not sufficient for this purpose.

Cro.Car.102.
Bigot v.
Smith.

So in a subsequent case, where baron made a feoffment to the use of himself and his wife, and of the *heirs of the survivor of them*; and afterwards made another feoffment of the same lands; it was adjudged that the right of entry in the wife was not sufficient to support the contingent fee, and vest it in her on death of the baron. In this case we observe that the particular estate was not subsisting at the husband's death, when the fee should have vested;

vested ; for his second feoffment had destroyed it during the coverture ; and though the wife's *right of entry* took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing. — We are to distinguish this from the above cited case of *Corbet v. Tichborn*, where the crown, it seems, took only the same estate as the husband had, and nothing was divested, nor the wife's estate turned to a *right*. Supra 209.

But where the estates are limited by way of *use*, and are afterwards divested and turned to a *right* ; it has been held requisite to the execution of the subsequent *contingent uses*, that either the *cestui que use* under some preceding vested use, or else that the feoffees or their heirs should enter, in order to re-vest the estates ; for although contingent uses are not destroyed by such a divesting of the preceding estate as turns it to a *right of entry*, as they would be if such estate was determined, or turned to a *right of action* only ; yet, it has been said, there must, at or after the time when such uses come *in esse*, exist a *seisin* in the feoffees, out of which those uses may arise, before they can be executed by the statute. — This doctrine apparently involves some degree of difficulty in it, I shall therefore endeavour to explain it. Vide foregoing cases.

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Vide Chud-
leigh's case.

1 Rep. 120.

*1. Hand. on the case of
the King v. the Bishop of
Exeter, 151. Sugd.
in Powers case
in 1012 non fin
Vill. Juris
17. & lower
Seintilla Juris
in answer
to Mr. Kearne
& Mr. Sugden.*

It appears to have been the opinion of the court in *Chudleigh's case*, that upon a conveyance to uses, there is no *actual seisin* left in the feoffees; but that as to all the uses *in esse*, and which vest immediately, the *seisin* is presently transferred unto the *cestuique use*; and that as to the uses not *in esse*, there is no present *seisin* existing any where; but only a *possibility of a seisin* in the feoffees, to serve those uses when they come *in esse*; which takes effect as the contingencies on which the uses depend arise, so as then to give the feoffees &c. a sufficient *seisin* to serve such uses, that they may be executed by the statute, if the estates limited in the conveyance to uses be not in the mean time *devested*; but that if the estates happen to be first *devested*, then that *possibility of a seisin* in the feoffees is *devested*, as well as the other estates; and must be reduced and *revested* before the contingent uses can be executed.

Vide *Bigot v. Smith*, *supra*,
p. 215.

Now if this *devesting* or disturbance of the estates limited in the conveyance to uses, has operated so far, as not to leave a right of entry in any preceding vested estate; then is the contingent use entirely destroyed and gone, as we have already seen, for want of a preceding estate to support it; but if a right of entry is left in any preceding vested estate, then, the *cestuique use* having such right of entry,

entry, may, by his entry, ~~revest~~ (as it has been said) the estates which were divested, and amongst the rest the *possibility of seisin* in the feoffees to serve the contingent uses: but if no such entry should be made, then, it has been said, the feoffees or their heirs must enter, to re-vest their seisin, for that otherwise there would exist no seisin to serve the contingent uses; and consequently, that if the feoffees should bar their own right of entry upon such an occasion, by feoffment, release or otherwise, the contingent use can never be executed for want of a seisin in the feoffees out of which it may arise; and that the *cestuique use* will then have no other remedy, than against the feoffees in a court of equity for breach of trust.

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Vide Manfel
v. Manfel,
infra, p. 251.

As if a feoffment be made to the use of *A.* for life, remainder to the use of *B.* for life, remainder to the use of the eldest son of *B.* in tail &c., here the feoffment of *A.* (it is clear) will not destroy the contingent remainder to the son of *B.* because of the right of entry in *B.* upon the forfeiture of *A.*: and if *B.* enters either in the life-time of *A.* or after his death, this, it has been said, will reduce the contingent remainder; so that if a son be born in his life-time, it shall be executed by the statute without any entry of the feoffees. And it has been further said, that if after the feoff-

2 Roll. Abr.
796. pl. 12.

Ibid. pl. 13.

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2 Rol. Abr.
797. pl. 14.

ment of *A.*, *B.* dies without having entered, though he should have a son born in his lifetime, that son cannot enter, the seisin of the feoffees having been disturbed and not re-vested; but that in this case the feoffees may enter, and thereby revive the contingent use, which, by their entry, it is said will be executed in such son by the statute; but that if after the death of *B.* without entry, the feoffees should by feoffment or otherwise bar their entry, then the contingent use can never be executed for want of a seisin in the feoffees to serve it. These points, it seems, were agreed upon by *Rolle C. J.* and the other judges of the *King's Bench* in their debate of the case of *Wegg v. Villers*.

Ibid. pl. 16.
And vide
Brent's case,
2 Leon. 14.
Dy. 339. pl.
48.

3 2 Rol. Abr.
796. pl. 11.

Vide supra,
p. 214.

It is this supposed necessity for the existence of a seisin in the feoffees, at or after the time when the contingency happens, in order to serve the contingent use, that accounts for the observation before cited, as made by *Glyn C. J.* with respect to the case of *Sir Edward Coke*, viz. that if *Sir Edward* had made the feoffment before he had granted the reversion, the contingent use to the first son of his daughter had been destroyed. It was agreed in *Chudleigh's case*, that *privity of estate* is absolutely requisite to the standing seised to a use: that is, that a person must come in of or under the same estate or seisin, out of which the

the uses were originally limited to arise; otherwise he is not seised to those uses. Now in the case of Sir *Edward*, the contingent uses were to arise out of the estate or seisin which was in him before he granted the reversion, *i. e.* out of the reversion expectant on the death of his wife and daughter; for the seisin of the particular uses *in esse* were executed to the uses by the statute; so that Sir *Edward* actually stood seised of nothing more than the reversion. Therefore, when Sir *Edward* granted the reversion without consideration, and reciting the uses, he did no more than grant or transfer that *same* estate or seisin which was then in him, and out of which the contingent uses were to arise; for his grant could pass no more than he had and lawfully might pass; and consequently his grantee, who came in, in privity of the same estate and seisin, stood seised to the uses which were to arise thereout, being the same to which Sir *Edward* stood seised before such grant; then the subsequent feoffment of Sir *Edward*, divested this estate and seisin of his grantee, together with the estates of the wife and daughter; but as long as there was a right of entry in the daughter, that was sufficient to support the contingent use to her first son, provided there should be a seisin to serve it when arisen; for though in conveyances at common law, a right of entry in some preceding

F f 4

estate,

How far a
lease for years
will disturb
or bind such
contingencies
Vide Wood
v. Reingold.
Cro. El. 764.
854. 2 Roll.
Abr. 794.
Bald v.
Wynston.
Cro. Ja. 165.
2 Roll. Abr.
793. Barton's
case. Moore
742. Cro.
Eliz. 765.

estate, would alone have preserved a contingent estate, and no entry of the person entitled to such preceding estate was requisite to give effect to the contingent remainder ; yet, the doctrine I have been just now explaining, required that where the limitations were by way of *use*, there should, besides a right of entry in some preceding estate, be also a *seisin* in the feoffees, &c. to serve the contingent use.

Now, when the wife entered after the death of Sir *Edward*, she thereby reinstated all the *divested estates*, and, amongst the rest, the estate and *seisin* of Sir *Edward's* grantee : which I have already observed was the estate or *seisin* out of which the contingent uses were to arise ; so that the *seisin* which was to serve these contingent uses, was restored by this means. Thus we see the right of entry in the daughter, supported the contingent use to her son, so as to preserve its *capacity* of taking effect, if the *seisin*, out of which it was to arise, should be subsisting at or after the birth of such son, in order to be executed to the use by the statute ; and the entry of the wife re-vested and restored the *seisin*, which was to serve that use when or after it came *in esse*.— But if Sir *Edward* had made a feoffment in the first instance, though *without consideration* and *with notice* ; yet, as that feoffment would have

have been a *disseisin and divesting* of all the estates then subsisting, and of course of that estate or seisin out of which the contingent uses were to arise, and which was to serve them; the feoffee would not come in in privity of that estate or seisin out of which such uses were originally limited to arise, but would come in of a *new* estate acquired by *disseisin*, and of consequence could not, according to the doctrine I have been explaining, stand seised to those uses; and therefore as there would then have subsisted no *seisin* to *serve* the contingent uses when or after they arose, though the right of entry of the daughter so far supported the contingent use to her son, as to preserve its *capacity* of taking effect, if the seisin out of which it was to arise had subsisted, yet (admitting the doctrine above explained) such contingent use must fail for want of a *seisin* to *serve it*; for the feoffee we see could not stand seised to such use, he not coming in in *privity* of the estate or seisin out of which it was to arise; and no entry of the wife or any one else could restore the estate and seisin of Sir *Edward* or his heirs, contrary to his own feoffment.

But all that has been said, in regard to the supposed necessity of an *entry* to revest and restore contingent estates, relates only to estates limited or created by way of *use*. For
in

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in estates created by conveyances at common law, there is no sort of doubt, that a mere right of entry, without any actual entry at all made, supports the contingent remainder; as if a gift in tail be made to *A.* remainder to the right heirs of *B.*, if tenant in tail be disseised and die, the remainder is not destroyed, for the right of the particular estate supports it. And so in *Archer's* case, if *Robert* had been disseised and died, it was held that the remainder would have been good, because the particular estate would have remained in right, and might have been revived.

1 Rep. 135. b.
and vide
Loyd v.
Brooking,
infra, p.
248.

Supra, p.
102.
1 Rep. 67. a.

What I have above been endeavouring to explain, respecting the supposed necessity of an actual entry to restore or reduce *contingent uses* after they have been divested; is, indeed, the doctrine expressly laid down by *Rolle C. J.* and his brethren the judges of the *K. B.* in their arguments upon the said case of *Wegg v. Villers*, and alluded to by *Glyn C. J.* in his argument upon the case of *Heyns v. Villers*, reported by *Skinner*; and therefore I could not pass it by, consistently with my professed design in this essay. Yet, I cannot help observing, that I think we ought to be very cautious how we at this day admit such a doctrine in practice; a doctrine which would lead us to conclude, that in the common cases

cases of strict settlement upon marriage, where the conveyance is by way of use, if the father, the first tenant for life, were by feoffment &c. to divest the estates, leaving them a right of entry, the contingent remainders to the sons &c. could not take effect; unless the mother, supposing her to take a remainder for life and to survive the father, or else the trustees to whom the remainder for preserving contingent uses was limited, or else the general grantees or releasees to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion, which, with all due deference to what was delivered by the court of K. B. in their arguments upon the said case of *Wegg v. Villers*, I cannot persuade myself would hold at this day; for, (224)

First, as to what was resolved in the said case of *Wegg v. Villers*, we are to observe; that as there was, besides the *right of entry* in the daughter, an *actual entry* made by the mother in that case; the point whether the mere right of entry in the daughter would have been sufficient, without any entry by her or by the mother, or by the grantee, was not the question which came before the court; nor of consequence, did the judgment of the court in that case, depend upon or decide the doctrine in regard to that point. And

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And as to the other cases put and agreed to by the court in their debate of the principal case, the opinions upon them were really extrajudicial; and, indeed, so far as they respected the supposed necessity of an entry to restore or reduce contingent uses; they appear to have been founded on an artificial strain of reasoning, much too subtle and metaphysical to bear any great streels.

3 If we are to infer (as is said in the arguments in *Cbudleigh's* case) a *scintilla juris* in the feoffees, that may enable them to enter and restore their *possibility of a seisin*, (or, if the contingency has happened, their *actual seisin*) to serve the contingent uses; what is it that confines us to such narrow and insufficient limits, in regard to the measure of this *scintilla juris*? Why not extend the inference one degree further, and suppose such a *scintilla juris*, as may be competent to serve the contingent uses, without the unnecessary circuituity of an *actual entry*? The latter inference is certainly more adequate, and better adapted to the end proposed; and what is there discoverable in the statute of uses, which excludes this and admits the former? Nay, how does it appear that any thing, contained in that statute, puts us to the necessity of recurring to any *scintilla juris* at all in the feoffees, or any entry to be made either by them

them or by the *cestuique use* under any preceding vested use, in order to restore and reduce a contingent use to the capacity of taking effect, whilst a right of entry subsists in any preceding *cestuique use*? On the contrary, does not the statute expressly enact, that where any person, &c. is seised to the use of others, such other persons, *i. e.* the *cestuique use*, shall be deemed and adjudged in lawful seisin estate and possession, &c. to all intents, constructions and purposes in the law, of and in such like estates as they had in the use, &c.? And must not these words to all intents, constructions and purposes in the law, be referred to the legal properties, qualities and capacities of estates of the like degree or measure at common law? If so, the *cestuique use* become intitled to, and take by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties and capacities of estates at common law, of the like degree or measure; now one of the legal qualities or capacities, of an estate at common law, of the degree or measure of freehold is, that after it is divested and turned to a right of entry, such right of entry will support a contingent remainder; and one of the qualities or capacities of a contingent remainder at common law is, a capacity of being supported by such right of entry: why then do not, a preceding vested use, of the degree or mea-

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Vide 2 Co.
Rep. 54. a.
Moor 212.
1 Leon. 258.
1 Mod. 155.

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3 sure of freehold, and a subsequent *contingent use*, respectively, acquire these *legal qualities*, properties or capacities, amongst other qualities or properties of estates of like nature and degree at common law? If they do, it is obvious there can be no necessity for any *actual entry* by any body, to restore a contingent use, where there subsists a *right of entry* in a *cestuique use* of a preceding vested freehold to support it; but such right of entry alone will preserve it's capacity of vesting and taking effect. If we deny this, we at the same time deny that the *cestuique use* have lawful seisin, estate and possession, &c. to *all intents, constructions and purposes in the law*, of such estate as they have in the use.

I think, that a little attention to the apparent operation of the statute of uses, in relation to this point, will be sufficient to prevent our too hastily admitting a doctrine, which, without the aid of metaphysical subtleties, seems hardly reconcilable to the *express force* of that statute.

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2 Jon. 124.
Key v. Gamble.

In regard to the estate requisite to support a contingent remainder, it is further to be observed; that the *estate supporting and the remainder supported*, should both be created *by one and the same deed or instrument*; therefore an estate for life given by one deed, will

will not support a remainder given by another; nor an estate for life settled by *A.* on *B.* by *deed*, enure to support a contingent remainder given by the *will* of *A.*

As where *A.* being tenant for life by marriage-settlement, remainder to his wife for life, remainder to his first and other sons by that *marriage* in tail-male; his father, the reversioner, reciting the settlement in his will, and devising the lands to the first son of *A.* &c. according to the settlement, then if *A.* should die without issue of that marriage, he devised to the first and other sons of *A.* by any other wife in tail-male, and if *A.* should die without issue, then he devised that all the land should go to his grandchildren by his daughter *P.* in fee. It was contended, that *A.* under this devise took an estate-tail by implication; and of course the remainder over in fee was well supported. But the court held it was impossible to make this an estate-tail in *A.* for nothing was given him by the devise, but he had only the estate which he had by the first settlement. That here being two several conveyances, the devise could not be tacked to the estate for life which was limited by another conveyance, even admitting that the word issue could be an implication of an estate to the heirs of the body of *A.*

4 Mod. 316.
Eq. Abr. 182.
1 Ld. Raym.
37. Skinner.
558. Moor
v. Parker.

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Vide this case
infra. 321.

Snow v. Cut-
ler. 1 Lev.
135.
Raym. 162.
Sid. 153.
Vid. supra.
P. 55.

So where feme being tenant for life, her husband devised to the heirs of her body if they attained fourteen years; it was no remainder, but an executory devise; for tho' the wife had a preceding estate for life, yet this was a new devise, to take effect after her decease, and was not a remainder joined to a particular estate.

Pollexf. 66.
in the case of
Weal and
Lower.
Supra 6.

Where *A.* made a feoffment to the use of himself for life, and after the death of *A.* and *M.* his wife, to the use of *B.* (eldest son of *A.*) for his life; this was held to be a contingent remainder in *B.* being created by the *same deed* as the particular estate.— But though it did not appear in the case, yet it afterwards appearing upon examination, that by a *former deed* *M.* had an estate for life; Lord Chief Justice *Hale* said the use should not be contingent; but the mentioning that the commencement thereof should be after the death of *M.* was only expressing when *B.* should take the profits in *possession*; and did not make a contingency. This was not a remainder created by that deed; but Chief Justice *Hale*, considered it as a conveyance of the *then subsisting* reversion or remainder, expectant on the death of *M.*

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Vide Badger
v. Lloyd, in-
fra. p. 327.

Doe Lessee of
Fonnereau v.
Fonnereau.

So in a late case cited in a preceding page, where *C. F.* after having settled the land on his

his son *T.* for life, retaining the reversion in himself; by his will reciting the settlement on his son *for life*, he after his son's decease, gave the same land to the heirs male of his (said son's) body; and in default of such issue, to the testator's second and other sons successively in tail male. The testator died, leaving *T.* and four other sons; and it was decided, that the limitation to the heirs male of *T.* did not unite with his life estate under the settlement; but that such heirs male would have taken by purchase. And the limitation to the second son &c. of *C. F.* was held to be an executory devise, vesting in possession on the decease of *T.* without leaving issue male then living. It follows that the limitation to the heirs male of *T.* was an *executory devise*, and not a remainder: for if the limitation to the heirs male of *T.* had been a remainder; the subsequent limitation to the second son &c. on failure of such issue, would also have been a *remainder* vested in the second son, subject to the preceding contingent remainder to the heirs male of the first son.

Doughl. Rep.
470. supra
57. & vide
same infra.

It seems, that in cases where the legal estate is devised to, and vested in trustees in trust, there is no necessity for any preceding *particular estate* of freehold, to support contingent limitations; for that the legal estate in the general trustees, will be sufficient for

Vide of trustees to support contingent remainder, *infra* 249, 251, et seq.

Caf. temp. Talb. 145. Chapman v. Blisset.

the purpose; and consequently in such cases, it is not necessary, that a contingent remainder should vest by the time the preceding trust-limitation expires.

As where the testator devised his estate, real and personal, to trustees and their heirs, executors and assigns upon trust, to pay an annuity to his son *B.*, and after *B.*'s death, he devised one moiety thereof to such children as *B.* should leave and their heirs, and the other moiety to the future children of his grandson *C.* &c. the testator died, afterwards *B.* had children and died, and afterwards *C.* had issue; it was contended that the legal estate in the trustees, was determined at *B.*'s death, and therefore the limitation to *C.*'s children, being a *contingent remainder*, because limited *per verba de presenti*, and not vesting upon the death of *B.* (because *C.* had then no children born), could never vest at all; but it was held, that notwithstanding the limitation was *per verba de presenti*, as *C.* was very young at that time, the testator must have intended a future devise; and therefore that was no objection to its being *executory*; but if it were taken as a *contingent remainder*, as some of the trusts mentioned in the will, would not admit the estate in the trustees to be confined to the period of *B.*'s life; the estate continuing in them would support the limitation to *C.*'s

Vid. *infra*. P. 425.

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That trustees have a fee without words of limitation where the purposes of the trusts require it, vide 1 Vezey 491. 3 Burrow 1686.

C.'s children, though it could not vest at B.'s death; and therefore whether it were taken as a future limitation or a *contingent remainder of a trust*, it would be good either way.

So where A. devised to the use of trustees and their heirs, in trust for B. for life, remainder to his first and other sons successively in tail, remainder to the future sons of C. successively for life, remainder over; B. died without issue in the testator's life-time; the contingent limitations were taken as executory devises, because no child was then born to C.: afterwards a child was born to C. and died; and a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations, which could not vest at the death of such child were destroyed; as it had been decreed, that upon the vesting of the executory devise in that child, the subsequent limitations became *contingent remainders* upon that executory devise; but it was held, that the inheritance in the trustees, was sufficient to support the intermediate *contingent remainders*, till they should come *in esse*, altho' no particular estate to support, &c. was inserted; and that the estate should not vest in possession, whilst an object of any preceding limitation might come *in esse*.

Caf. temp.
Talb. 44.
Hopkins v.
Hopkins.

1 Vezey 268.
Hopkins v.
Hopkins.
1 Atk. 581.

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Yelv. 9, 10,
Salter v.
Butler.

Vid. infra.
fol. 234-5.

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Vide 3 P. W.
264. in the
note.
Barnardist.
Rep. in
Chan. 46.
Kendal v.
Micfield.

Here we may remark, that if rent were granted to *A.* for the life of another, the remainder over, though the grantee died, during the life of *cestui que vie*, so that the particular estate determined in interest as to the perception of the profits; yet inasmuch as the *terre-tenant* during this time held the land discharged, it was sufficient to support the remainder; *Per Popham*, and agreed by the whole court, in the case of *Salter v. Butler*. And this seems to accord with the case of a grant of rent to the tenant for life, with remainder over.—But *quare* whether this holding of the land discharged, would have supported a contingent remainder? Though it seems indeed, that in these cases of rents *pur auter vie*, upon the death of the grantee before the *cestui que vie*, (though strictly there is no general occupancy of rent,) the *terre-tenant*, by holding the land discharged, *i. e.* retaining the rent, might, perhaps, be considered in the nature of an occupant of the rent; and therefore in that view, the particular estate might be understood to have a continuance, sufficient even to support a contingent remainder. But at this day, it seems there can be no room for a question of that nature; for since the statutes of 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. the rent is holden to continue in the representatives of the grantee dying in the life-time of *cestui que vie*.

Of the Time When a Contingent Remainder should vest.

WE are now to consider the time at which it is requisite a contingent remainder should *vest in interest*; that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect, ought to happen.

It is not only necessary that a vested legal freehold estate, should precede a legal freehold contingent remainder, but some such preceding freehold estate must subsist and endure, until the time when the contingent remainder vests, that is, until the contingency comes to pass; for it is a general rule, that every remainder must vest, either during the particular estate, or else at the very instant of its determination. So that if a lease be made to *A.* for life, and after the death of *A.* and one day after, the land shall remain to *B.* for life, this remainder to *B.* is void, because it cannot take effect, immediately upon the determination of the preceding estate. This rule was originally founded on foedal principles, and was intended to avoid the inconveniencies which might arise by admitting an interval, when there should be no

Plowd. 25.

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tenant of the freehold, to do the services to the Lord, or answer to *strangers' præcipes*; as well as to preserve an uninterrupted connection; between the particular estate and the remainder, which in the consideration of law, are but several parts of one whole estate.

There are some few instances of *vested* remainders taking effect, though the preceding estate be defeated. As where lessor dis-

1 Inst. 298. a. seiseth *A.* his lessee for life, and makes a lease to *B.* for the life of *A.*, the remainder to *C.* in fee; here, though *A.* enter and defeat the estate for life, the remainder to *C.* is good: for having been once *vested* by a good title, it would be unreasonable that the lessor should have it against his own livery. So if a lease be made to an infant for life, if the infant at his full age disagree to the estate for life, yet the remainder is good, having once been *vested* by a good title. So if a rent be granted to the tenant of the land for life, the remainder in fee, this is a good remainder in fee, tho' the particular estate continue not: for *eo instanti* that he took the particular estate, *eo instanti* the remainder *vested*, and the suspension in judgment of law grew after the taking the estate. So if a lease be made to *A.* for the life of *B.*, the remainder to *C.* in fee; *A.* dieth, now (at common law) before the entry of an occupant, there was no particular

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And vide
Wade v.

Bache. Sid.
362.

ular estate, and yet the remainder continued good. But now since the statutes 29 Car. 2. c. 3. & 14 Geo. 2. c. 20. no such vacancy of the particular estate can happen.—However, it follows from the rule I have just mentioned, that where the event on which a *contingent* remainder is limited to take effect, does not happen by the time at which the preceding estate determines, it never can arise or take effect at all.

Vid. supra.
P. 233.

Thus, where *A.* being tenant for life, remainder to his eldest son in tail, *A.* died, leaving his wife *enfeint* with a son, who was afterwards born; the question was, Whether this son was entitled to the remainder under the limitation? And it was adjudged in the Common Pleas, and that judgment affirmed in the King's-Bench, that such posthumous son could not take, because he was not born when the particular estate determined. The judgment, it is true, was afterwards reversed in the House of Lords; but it was against the opinion of all the judges, who were much dissatisfied with the reversal; and indeed an act of parliament was thought necessary to take such cases as that out of the old law; by which it was enacted, that *where any estate is settled in remainder to children, with remainder over, any posthumous child may take in the same manner as if born in the father's life-time.*

1 Salk. 227.
Reeve v.
Long.

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Stat. 10 & 11.
W. 3. c. 16.

Vide 1 Durnf.
& East 634.

1 Inst. 378. a.

So if a lease for life be made with remainder to the right heirs of *J. S.*; this remainder will never vest if tenant for life die before *J. S.*; for in that case the particular estate determines, before the contingency comes to pass, on which the remainder is limited to take effect, *i. e.* the death of *J. S.*; for *nemo est heres viventis*.

Jenk. 248.

pl. 38.

2 Roll. Abr.

418.

(1) pl. 4.

So where *A.* seised of lands in fee, makes a lease for years to *B.* remainder in tail to *C.* remainder to the right heirs of *B.*; in this case *B.* has nothing in the fee, but it is a contingent remainder to his heir, (for *B.* did not take the freehold). If *C.* dies without issue in the life-time of *B.*, the remainder becomes void: for the foundation and support of this contingent remainder fails, because it ought to have a freehold to support it, when the remainder falls out; but by *C.*'s death without issue, living *B.*, the freehold is expired before *B.* can have an heir, and therefore the remainder will never take effect.

Doe v. Morgan.

3 Dursf. & East 763.

So in a case where the testator devised to his wife for life, remainder to *E.* his son for 99 years if he should so long live, and after the deceases of the wife and *E.* his son, to the heirs of the body of the said *E.*; but not to descend intirely unto *E.*'s eldest son; but that *E.* might appoint the same to all his children living at his

his death; and in default of appointment, then to his sons as tenants in common in tail, remainder to his daughters, remainder over. The mother died in the life-time of *E.* the son; and it was held that the limitation to the issue of *E.* being a contingent remainder failed by the death of the mother (who had the only preceding estate of freehold) in *E.*'s life-time, for want of a continuing particular estate of freehold to support it.

But although no interval is admitted, between the determination of the particular estate, and the vesting of the remainder; yet a remainder may be so limited, as not to vest until the very instant in which the particular estate determines. As if an estate be limited to *B.* during the life of *A.* remainder to the heirs of the body of *A.* this is good, though such remainder cannot vest till the very instant in which the particular estate determines. So if land be given to *A.* and *B.* during their joint lives, remainder to the right heirs of him who shall die first; this remainder will be good, though it cannot vest before the determination of the particular estate; and it is also observable, that the heir of him who dies first, shall have the land by descent, in conformity to the rule before treated of, where the ancestor takes a freehold,

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Vide Bigot
v. Smith.
Supra. p.
215.

1 Inst. 298. a.

1 Inst. 378. b.

Vide supra
23.

hold, with a subsequent limitation to his heirs in the same conveyance.

Vide Tuckerman v. Jefferies. 11 Mod. 108, 109 and Holt's Rep. 370.

Upon the principle here laid down, that a contingent remainder must vest by the time the preceding estate determines; it follows, that an estate limited on a contingency, may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons in common or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it.

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Lane v. Pannel. 1 Roll. Rep. 238. 317, 438. Supra, p. 46.

As in the case of *Lane* and *Pannel*, which as to the present point was in effect as follows: Feme covert and a stranger, being joint tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme; the stranger surrendered his moiety to the baron and feme, and afterwards the baron surrendered the whole to *B.* in fee, the feme died leaving issue, and afterwards the baron died; the question was, Whether the remainder to the heirs of the body of the baron and feme vested in the issue; and it was adjudged, that when the stranger conveyed his moiety to the baron, the jointure between the stranger and feme covert was severed; and when the baron afterwards conveyed the whole to *B.*, *B.* took an estate in one moiety for the life of the feme (defeasible by her on the

the death of her husband) and in the other moiety for the life of the stranger; therefore upon the death of the feme the estate in the first moiety was determined; at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be heir of the bodies of both baron and feme; but that was impossible during the life of the baron (for *nemo est hæres viventis*); and therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all as to that moiety. In this case it appears that the remainder failed as to one moiety.

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Gilbert in his Treatise of Tenures, seems not to approve of the resolution in the above case; for, by construing the limitation to the heirs of the body of the husband and wife, a contingent remainder; he says, we suppose a deed made and an estate given, where at the *very first* it appeared, that for one moiety the deed and estate could have *no manner of effect*, unless the husband and wife both died at one instant of time. But this seems to be a mistake; for the original limitation did not involve any such inconsistency; the inconvenience arose from the subsequent acts. The *joint* estate for life might have continued, unsevered between the wife and the stranger; and on the death of the survivor, there might

Gilb. Ten.
252.

Vide 3 Leon.
4.

Vide Goffage
v. Taylor.
Supra, 29.
Frogmorton
v. Wharrey.
Supra, 47.

might have been an heir of the bodies of the husband and wife, capable of taking, when the preceding estate determined; if both husband and wife had died in the life-time of the stranger; or if both husband and stranger had died in the life-time of the wife—*Gilbert* also refers to a case in *Leonard*, of a surrender to the use of the wife for life, remainder to the use of the right heirs of the husband and wife; where the justices were of opinion, that the remainder was *executed* for a moiety in the wife; but that was not only superseded by the contrary decision in *Lane v. Pannel*, but was contrary to the preceding case in *Dyer* 99. 2 *Roll. Abr.* 416. *Dalis.* 20. *pl.* 8. cited 2 *Leon* 102., as well as to the doctrine in the later cases, noticed in a former page of this treatise.

Comb. 467.
Bro. Done et
Rem. *pl.* 21.
And vide Co.
Lit. 9. a.

So likewise a contingent remainder may take effect in some, and not in all the persons to whom it was limited; according as some may come *in esse* before the determination of the preceding estate, and others not. As if a limitation be to *A.* for life, remainder to the right heirs of *J.* and of *K.*; here, if *J.* happen to die before *A.*, and *K.* to survive *A.*, the heirs of the first may take, but those of the latter, it seems, will be for ever excluded; for the heirs of *J.* are *in esse* at the determination of the preceding estate, but
not

not the heirs of K. who is then living, for
nemo est hæres viventis.

And it seems, the heirs of Y. and of K. will take as tenants in common and not jointly, on account of the estates vesting in such heirs at *different times*. It may, perhaps be said, this reason does not apply, if both Y. and K. be dead at the time of the limitation. Upon which, we are to observe, that the remainder in that case would not be *contingent*, but vested in persons *in esse* and ascertained. This doctrine however seems confined to limitations at common law; and not to extend to estates raised by way of *use* or by devise.

Co. Lit. 188.

a.

5 Co. Rep.

8. a.

13 Co. Rep.

57.

For where a contingent remainder is limited to the *use* of several, who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable; yet shall it divest as to the proportions of the persons afterwards becoming capable, before the determination of the preceding estate; and they may take jointly notwithstanding the different times of vesting.

Thus, where a conveyance was to the use of A. the husband for life, remainder to the use of B. the wife for life, remainder to the use of all the issues-female of their two bodies, and the heirs of the bodies of such

Comb. 467.

Matthews v.

Temple.

1 Ld. Raym.

311.

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Co. Lit. 188.
2.

such issues-female; *A.* and *B.* had issue a daughter; and it was resolved, that the remainder in tail to the issues-female, was not so attached in that daughter, as not to be devested for a moiety on the birth of another daughter; for such a limitation, being by way of use, springs out of the estate according to the capacity of the person in whom it is to vest. And *Holt* held, that the daughters were joint tenants of the freehold and tenants in common of the inheritance. He said, that the case put in *Coke* upon *Littleton* of a feoffment to the use of the feoffor for life, and of such wife as he should afterwards marry, that on their subsequent marriage he and his wife were joint tenants, ruled the case before him; for it was a joint claim by the same conveyance, which, he said, made joint-tenants, and not the time of the vesting; and he seemed to deny the case cited from *Co. Lit.* of the heir of *J.* and of *K.* taking as tenants in common above noticed.

Oates v.
Jackson.
2 Stra. 1172.

So, where one devised to his daughter, and her children on her body begotten, or to be begotten by her then husband, and their heirs for ever; the daughter at the time of the will had one child, and others afterwards. It was held, the mother and all the children took jointly in fee, it being stated, that at the time of the will, she had a child, which

had been construed equal to children, 2 Vern. 106.; that Co. Lit. 9. was express that to *A.* and *liberis suis* and their heirs was a joint fee to all: and that it was no objection, that the several estates might commence at *different times*.

Vide Moor
177. 220.
Pollexf. 373.

This vesting of a remainder in the first person coming *in esse*, so as to divest as to the shares of others afterwards coming *in esse*, to participate thereof, is not confined to limitations in *joint tenancy*; it equally extends to tenants in common. Thus in the case of a devise to the testator's niece for life, remainder to trustees to preserve contingent remainders, remainder to all and every of her children by her then husband and their heirs for ever, equally to be divided between or among them, if more than one, share and share alike, if but one then to that one his or her heirs for ever; the daughter had no child at the testator's death, but afterwards had three by her said husband, who died in their parent's life-time. One point contended for was, that the limitation to the children being in fee, was contingent till the *death of the mother*; and therefore the remainder over took effect, on her leaving no child; but it was held, that the fee vested in the child first born, and afterwards opened and let in those born at subsequent periods.

Doe on demise of Comberbach v. Perryn.
3 Durnf. & East 484.

So,

Doe v. Martin.

4 Durnf. &

East 39.

Supra, 162.

So, in a case above cited, of a settlement to the use of wife for life, remainder to the use of the husband for life, remainder to the use of all and every their child or children equally, if more than one as tenants in common, &c. subject to a power of appointment in the parents; it was held, that the remainder vested in the children on their respective births.

Bac. Law

Tracts, 351.

Vide Co.

Lit. 188. a.

Dyer 339. b.

In the case of future use limited to two, where one becomes capable before the other, it seems they will take jointly, for it is laid down, that if I make a feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I afterwards marry, my wife will take the whole use; and if I afterwards have a son, he will then take jointly with my wife.

Vide 2 Salk.

577. 2 Lev.

39.

And here it may be observed, that if there be no particular estate *in esse*, nor any present right of entry when the contingency happens; although the particular estate be afterwards replaced and restored, yet will the remainder never arise. Only it seems, that the reversal of a fine by act of parliament, will restore a contingent remainder destroyed by that fine, though a reversal for error will not.

3 Keb. 87.

Cole v. Le-

vingstone.

1 Ld. Raym.

314.

How Contingent Remainders are destroyed or prevented taking effect. (241)

IT has been already shewn, that a legal remainder must vest either during the existence of the particular estate, (*in esse* or in *right of entry*) or at the very instant of its determination, otherwise it will never take effect at all. Consequently, every such determination of the preceding estate before the contingency happens, as leaves no right of entry, must effectually destroy such contingent remainder. I shall first instance some cases wherein the determination of the preceding estate ariseth by the feoffment, forfeiture, surrender, or other act of the particular tenant; and afterwards consider those cases, wherein the preceding estate is merged by descent of the inheritance on the particular tenant; for where the inheritance comes by descent on the particular estate, we shall find some exceptions to the generality of the preceding conclusion.

Vide 2 Roll.
Abr. 418.
pl. 1, 2.

In the case of a gift in tail to *A. C.* the remainder to the right heirs of *J. S.* the donee made a feoffment in fee, and afterwards *J. S.* died. It was held, his heir should not have the land, for the estate was by the feoffment of tenant in tail divested or discontinued;

1 Co. Rep.
137. b.

And vide
Powle v.
Veere.
Moor. 554.

tinued; and there was not any particular estate *in esse* or in *right*, to support the remainder, for by the feoffment of tenant in tail, his right was gone; but if he had been disseised and died, that would not have tolled the remainder; for then a right of the particular estate would have remained to support the right of the remainder.

1 Rep. 66.
Archer's case.
Vide supra,
242.

- (242)

And so where lands were devised to *A.* for life, and after to the next heir-male of *A.* and the heirs-male of the body of such next heir-male; *A.* having issue a son, made a feoffment to *B.* upon whom the son entered; and it was adjudged that this was a contingent remainder to the son of *A.* and therefore was destroyed by the feoffment of *A.* who was but tenant for life; for that every remainder must vest either during the particular estate, or *eo instanti* that the particular estate determines: in this case the particular estate was determined by the feoffment of *A.*, and since the remainder could not then vest, for *nemo est heres viventis*, it could never afterwards arise.

2 Lev. 39.
Purefoy v.
Rogers.
4 Mod. 284.
2 Saund.
380.
And vide
infra, 280.
299.

So where feme covert was tenant for life, with remainder to her first son; and before the birth of any son, the reversion in fee was conveyed to the husband and wife by fine; a son was afterwards born, the feme died; and

the court held, that although, if the feme had survived her husband, she might have waived and avoided the estate taken by the fine; yet the contingent remainder to the son was utterly destroyed, he not being *in esse* when the particular estate determined; that the baron and feme took by entreties, and so the estate for life of the wife was merged before the contingency happened; and that the possibility which the wife had of waiving the inheritance given by the fine, and thereby reviving the particular estate for life, would not preserve it. For that if the particular estates which support contingent remainders, are not *in esse* when the contingency happens, the contingent estates can never arise, whether it happens by surrender, merger, or any other way.

Vide *supra*,
P. 215.

(243)

So where there was tenant for life, with remainder to his first and other sons successively in tail, remainder to *B.* in tail; tenant for life before the birth of any son, surrendered to *B.*; a son was afterwards born, and the court held, that the surrender, if good, would have barred the contingent remainder: but the surrender was adjudged void, because it afterwards appeared, that the surrenderor was *non compos* at the time of the surrender.

Thompson
v. Leach.
2 Vent. 198.
2 Salk. 427.
576. 618.
1 Ld. Raym.
313.
3 Mod. 301.
Carth. 211.
435.
Sho. Caf.
Parl. 150.

Jenk. Cent.
248. pl. 38.

Jenkins I observe states a case, and says, if *A.* makes a lease for life to *B.* remainder to the right heirs of the body of *J. D.*, if *B.* in the life-time of *J. D.* surrenders to *A.*, yet the lease, notwithstanding the surrender, supports the contingent remainder to the heirs of the body of *J. D.* He refers to the pleadings in *Archer's* case, 1 *Rep.* 63. and to 1 *Rep.* 113. for this point: But I can discover nothing in either of those places respecting it: it is said indeed, 1 *Rep.* 130-1, that if a lease be made for life, remainder to the right heirs of *J. S.* if lessee for life maketh a feoffment or dieth during the life of *J. S.* the remainder to the right heirs of *J. S.* is destroyed: but this does not seem to go at all to the point.

Jenkins's statement of the above case, seems to suppose the *right* to the lease to continue after the surrender; as I collect from his immediate reference to the case of a *right* of a remainder for life, after a feoffment by tenant for life, supporting an ulterior contingent remainder.—But to account for such a continuance of the *right* of the lease, we must either suppose the surrender void, as to any merger of the estate for life in the inheritance; because the *immediate* inheritance expectant on the estate for life, which was limited in *contingency* to the right heirs of *J. S.* was not in *A.* the lessor to whom the surrender

surrender was made, but in *nubibus*, according to the doctrine hereafter noticed ; or else that the life estate, if merged, as between the parties, still had a continuance as to the interests of strangers, sufficient to support the contingent remainder. The first of those suppositions is, I think, open to objection ; and the latter is directly opposed by the case of *Thompson v. Leach*, in which it appears that the surrender, if valid, would have destroyed the intermediate contingent remainder.

Vide infra.
285.

Vide Plowd.
198. b.

Infra. 285.

And vide
1 Co. Rep.
67. a.

And here I shall refer, for further instances, to the cases of *Carter v. Barnardiston*, *Lodington v. Kime*, *Doe v. Holmes*, and several other cases cited in a subsequent part of this essay.

Vide infra,
281-2. 297.

We are to remember, however, that the surrender of a copyhold will not destroy a contingent remainder ; as where *A.* seised of a copyhold in fee, surrendered it to the use of his will, and afterwards devised it to *B.* for life, the remainder to *his heirs of his body* begotten. *B.* was admitted, and surrendered it to the lord of the manor, to the use of the lord *to do his will* with it. *B.* died ; the question was, Whether admitting the limitation to the *heirs &c.* to operate as a remainder, such remainder was destroyed by the surrender of *B.* ? It was adjudged that the remainder was not destroyed, because the legal free-

Paufey v.
Lowdall.
2 Roll. Abr.
793. pl. 6.
Style 249.
273.
Supra 44.

But copyholds may be intailed by custom.

Vide Co. Lit. 60.

Gilb. Ten. 135. et seq.

(245)

Vide supra, p. 238.

hold was in the lord during the life of *B.*; so that even a vested remainder-man could not have entered during *B.*'s life; but it was afterwards adjudged, that the limitation gave a fee-simple conditional to *B.* (copyholds not being within the *statute de donis*) and therefore the former judgment was reversed on this new point. So in the above cited case of *Lane v. Pannel*, it is observable, that the surrender by the baron to *B.* in fee did not destroy the contingent remainder; for the legal freehold being in the lord, the surrender of the baron passed no more than he lawfully might.

Mildmay v. Hungerford. 2 Vern. 243.

Again, where copyhold lands were devised to *A.* for life, remainder to his first and other sons in tail, &c. remainder to *B.* in fee, *A.* before he had any sons born, bought the reversion of *B.* and had it surrendered to his (*A.*'s) own use, thinking by that means to merge his estate for life, and so destroy the contingent remainder to his first son. But, however, it was agreed that this surrender of the reversion would not bar the son; because the freehold and inheritance were in the lord; for there is not the like inconvenience as in freehold estates at common law, in respect of contingent remainders, where there is nobody against whom to bring the *præcipe*.

Here

Here we may attend to the observation of *Gilbert*, respecting the destruction of contingent remainders in copyholds; who after noticing that it had been made a question, whether by the destruction of the particular estate, the remainder that was in contingency (in copyholds) should be destroyed; says, as to this point, we ought to distinguish; for it seems, some are and some are not. As if an estate be given to a copyholder for life, remainder to the right heirs of *J. S.*; if the tenant for life die, living *J. S.* there it seems clear, that the remainder is destroyed; for it cannot take effect as by the limitation it ought; but that if tenant for life, in that case, had committed a forfeiture, or made a surrender, and afterwards *J. S.* had died in his life-time, it seemed to be very clear, that his right heir might take; for his remainder was not to take effect after the *determination* of the interest of tenant for life, but after his *death*; and when that happened he was able to take.

Gilb. Ten.
249.

Upon the above distinction, we are to observe, that the first position of it, is proved by the case of *Lane v. Pannel*; and the other is established as well by that case as the rest that I have cited on the subject. And as to the remainder in copyholds, after an estate for life, not commencing on the *determination* of that estate. *Vide* the references in the margin.

2 Roll. Abr.
(S. 3.) pl. 6.
Sty. 249.
2 Co. Rep.
107. a.
1 Saund.
151.

2 Freem.
213.
Penhay v.
Hurrel.

(246)

And vide
3 Atk. 729.

Vide Boteler
v. Allington
1 Brown
Canc. Cas.
72.

So likewise it appears, that *cestuique trust* for life, cannot by feoffment or other conveyance commit a forfeiture, or destroy a contingent remainder. For though when the trust of an estate is limited to a man and the heirs of his body, with remainder over, if such tenant in tail of a trust suffer a recovery, the remainders will be barred; yet where tenant for life of a *trust* conveys in fee by feoffment or any other conveyance, it is no forfeiture of his estate, neither will it destroy a contingent remainder depending on it; because whatever conveyance he makes, as he has not the legal estate in him, it passes only what he can lawfully grant, (*i. e.* his trust estate for life,) and a right of entry resides in the trustees in whom the legal estate is vested. But the reason why a recovery suffered by tenant in tail of a trust, will bar the remainders, is, because he is master of the estate, and may call in the legal estate when he pleaseth, and have it conveyed to the trust. But the court of Chancery will never execute the estate in law to tenant for life of a trust, to enable him to destroy the contingent remainders.

And here we may remark, that if there be tenant for life with contingent remainder thereon depending, it seems a *bargain and sale* by him in fee, does not destroy the contingent remainder: for it is the nature of a bargain

bargain and sale to pass no more than a man lawfully may pass; therefore in the case now put, nothing more passes than the estate for life of the bargainor; so that the same estate continues in the bargainee, and is not destroyed or determined.

Vide Gilb.
Law of Uses
and Trusts
140.

The same reasoning seems equally applicable to a conveyance by *lease and release*; that being likewise an innocent conveyance disturbing no estate, but passing only what the releasor lawfully may pass. For as to the operation of the lease and release by the trustees in the case of *Mansel v. Mansel* hereafter cited; it did not depend upon the nature of the conveyance, but upon the estate of the trustees, being thereby conveyed to, and becoming merged and extinguished in the reversion and inheritance.

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Vide Co.
Lit. 328. a.
Gilb. Rep.
236.

Infra, p. 251.

It is also to be observed, that there are some acts by tenant for life, which, though they amount to a forfeiture of his estate, so as to give a vested remainder-man title to enter if he pleaseth; yet as they discontinue, divest, or disturb no remainder or subsequent estate, nor make any alteration in or merger of the particular estate; do not therefore, as it seems, destroy or affect a contingent remainder; unless advantage is taken of the

the forfeiture by any subsequent vested remainder-man.

Co. Lit.
252.

Vide 9 Rep.
106. b.

(248)

1 Ventr. 188.
Lloyd v.
Brooking.

Thus if tenant for life accepts a fine *come ceo &c.* from a stranger, it is undoubtedly a forfeiture, so as to intitle a remainder-man to enter, for he hereby affirms on record the reversion to be in a stranger; and yet it does not displace or devest the remainder or reversion. Therefore, where *A.* was tenant for life remainder to his first son in tail, *&c.* remainder to *B.* for life, remainder to his first son in tail, *&c.* *A.* having a son, accepted a fine from *B.* and then made a feoffment in fee; then *B.* had issue a son; and it was resolved, that the acceptance of the fine displaced nothing; and though *A.*'s feoffment displaced all the estates, yet the right of entry in the son of *A.* supported the contingent remainders.

But a contingent remainder, may be destroyed by an act, which though it does not discontinue or devest any remainder or subsequent vested estate, yet extinguishes the particular estate on which the contingent remainder depends. This we have already seen in the instance of a surrender to the next in vested remainder. And so if *A.* be tenant for life, remainder to his first and other sons in tail, remainder to *B.* in fee; and *A.* and *B.* join in a fine to a third person, this is no discontinuance

2 Saund. 386.
3 Keb. 12.

continuance or divesting of any estate, because each gives only his own. Yet it is held the intermediate contingent remainders are destroyed by the union of the particular estate with the remainder in the grantee; after which no distinct particular estate exists to support the contingent remainder. And vide *Purefoy v. Rogers*, *Mansel v. Mansel*, and other cases of the union of the particular estate with the inheritance.

Supra 242.
Infra 251.
262. et seq.

Whether a contingent remainder is created by a conveyance at common law, or limited by way of use, the same rule holds in regard to its capacity of being destroyed.

1 Co. Rep.
138. a.

As where *A.* having issue *B.* and *C.* and other sons, made a feoffment to the use of feoffees and their heirs during the life of *B.*, remainder to the use of the first and other sons of *B.* successively in tail, remainder to the use of *C.* in tail-male, remainder to *A.*'s other sons in tail, remainder to his own right heirs; *A.* died, the feoffees enfeoffed *B.* in fee *without consideration*, and *with notice* of the said uses; afterwards *B.* had a son; and the question was, Whether the contingent remainder to him was barred by the feoffment? And it was adjudged, upon solemn argument in the Exchequer-chamber, that there being no son of *B.* to take when the particular estate determined by the feoffment

Chudleigh's
case. 1 Co.
Rep. 120.

(249)

Cro. Jac.
168. Bell's
case cited.
And vide
Smith v. Be-
lley. Cro.
Eliz. 630.
Moor 545:

feoffment (which was a forfeiture) the son could never after take; for that a remainder in *use* ought to vest during the particular estate, or at least *eo instanti* it determines, as well as a remainder at common law. So if one make a feoffment in fee, or covenant to stand seised, to the use of himself for life, and afterwards to the use of his first son in tail-male; and before the birth of any son, make a feoffment in fee, such feoffment will destroy the contingent remainder to the son.

The reason why the feoffment in *Cbudleigh's* case, though *without consideration*, and *with notice*, destroyed the contingent remainder, was, because at law, privity of estate as well as want of notice, was requisite to the standing seised to a use: that is, it was necessary that the person standing seised to a use, should have come in, *of*, or at least *under* the same estate or seisin, out of which the use was limited to arise. Now in *Cbudleigh's* case, the feoffees were seised only of an estate for the life of the first son; whereas their feoffee, by force of the feoffment, came in of a greater estate; *viz.* a tortious fee-simple acquired by disseisin; which was neither the same estate nor yet an estate carved out of it; consequently there wanted that privity which at law was requisite to subject him to the original uses; therefore such contingent use failed.

(250)

It

It appears, that before the statute of uses, if the feoffees had aliened, *without consideration*, or *with notice*, the lands would have been subject to the old uses; but that was, because the feoffees themselves, before that statute, stood seised of the legal fee-simple; and of course their alienee came in, either of the same estate, or of an estate derived out of that. But since the statute it is otherwise; for now the feoffees are seised of no greater estate, than what is actually limited *in use* to them, the seisin being executed to the uses by the statute: from whence it follows, that when such feoffees do not take the use in fee; if they make a feoffment, their feoffees come in neither *of*, nor *under* the estate which they were seised of, but of a new estate acquired by disseisin.—But though this appears to be the strict legal doctrine, in the case of feoffees or grantees to uses; yet the interposition of a court of equity will make a material difference, where there are estates limited in *trust* to support contingent remainders, according to the modern practice. — For we are to observe, that the legal subjection of contingent remainders, to the power of the tenant of the preceding particular estate of freehold, on which they depend, has occasioned the resort to, what are stiled, estates to preserve contingent remainders.

Vide 1 Co.
Rep. 122. b.
3 Co. Rep.
81. b.
Gilb. Law of
Uses, 7, 8.
Bro. Feoff.
al. uf. pl. 50.
Bac. Law
Tracts, 312.

The

That it need
not be con-
fined to life
of tenant for
life of the land.
Vide 1 Atk.
596.

Vide Black.
Com. 171-2.

But an estate
to strangers
for this pur-
pose under a
covenant to
stand seised,
&c. is void.
Vide 2 Lev.
54.
3 Keb. 110.

Vide supra
153. and Vin.
Abr. v. 18.
p. 413.

The estates I am speaking of, are limita-
tions of the *use* or *legal estate*, from and after
the determination of the estate of tenant for
life, by forfeiture or otherwise in his life-
time, to some trustees, &c. during his life,
in *trust* to preserve the contingent remain-
ders expectant on his decease, from being
destroyed, to which they would otherwise
be liable, from his surrender forfeiture or tor-
tious alienation. Subject to that trust, the
trustees are to hold in trust for the tenant for
life *and his assigns*. The introduction of this
practice is ascribed to some of our great law-
yers, during the time of the civil wars; in
order to secure, in family settlements, the
provisions intended for the issue of the mar-
riage, against being defeated by the parents,
the tenants for life. And at this day, such
precaution is constantly used in settlements
and conveyances on marriage, or by will or
otherwise, where there are any contingent
remainders, that call for such a protection.—
The legal estate, thus limited to the trustees
during the life of tenant for life, is a good re-
mainder vested in them; under which they
will have such a right of entry, in case of any
forfeiture or tortious alienation by the tenant
for life, as will support the contingent re-
mainders expectant on his decease.

Now,

Now, it seems, that if such trustees to support contingent remainders, join in a conveyance to destroy the contingent uses or remainders, which they were entrusted to preserve, a court of equity will consider it a breach of trust. And in general, if the purchaser under such conveyance comes in for valuable consideration, and *without notice*; then will the remedy of the person claiming under the contingent remainders, be against the *trustees*; who shall be decreed to purchase lands with their own money, equal in value to the lands sold by them, and to hold them upon the same trusts and limitations as they held the other. But if the conveyance be *with notice* of the uses, whether with or without consideration, in that case *the purchaser* shall hold the lands *subject* to the former trusts. Thus we observe the court of Chancery, for the protection of trusts, considers a purchaser from trustees with notice, as coming in privity of the same estate which the trustees themselves held; and then, pursuant to the doctrine of uses when in their fiduciary state, such purchaser holds the lands subject to the same trusts, as the trustees themselves did.

As where *A.* devised land to *trustees* and their heirs, to the use of his sister *D.* for her life, remainder to the use of the same trustees and their heirs during the life of *D.* in
trust

(251)

Vide Pye v.
Gorge.
1 P. W. 128.
Salk. 680.
Prec. Canc.
308.
1 Brown Parl.
Caf. 309.

Manfel v.
Manfel, 2 P.
W. 678. Caf.
temp. 1 alb.
252.

(252)

Vide *supra*,
P. 247.

trust to preserve contingent remainders, remainder to the use of the first and other sons of *D.* successively in tail-male, remainder to *E.* in fee: after testator's death *B.* married *D.*, afterwards *B.* and *D.* his wife, together with *E.* the remainder-man in fee, joined in a feoffment to (new) trustees, to the use of *B.* and his heirs: and a fine was afterwards levied to the same uses; shortly after, and before the birth of a son of *D.*, the trustees under the will, by lease and release conveyed the lands to *B.* in fee: and, upon a bill brought by the son of *D.* to have the benefit of the will of his uncle *A.* it was resolved, 1st. That the feoffment and fine by *B.* and *D.* his wife, did not destroy the contingent remainder, because the freehold in the trustees under the will supported it. 2^{dly}. That the lease and release by the trustees before the birth of any son to *D.* did, at law, destroy the contingent remainder. But as this conveyance was *with notice* (being to the tenant for life himself) it was held that the lands should continue liable to the same trusts, as they were when the trustees joined in the conveyance. And all parties were decreed to join in making such an estate to the plaintiff, as he would have been intitled to under the will of *A.* if the contingent remainder had not been destroyed; that was, an estate-tail.

But

But the court held clearly in the same case, that if tenant for life, with contingent remainders to his first and other sons, &c. depending on his estate, destroy the contingent remainders at law; tho' it be a plain wrong, yet, as he is no trustee, it is no breach of trust; and therefore equity will not interfere; for in such case *equitas sequitur legem*.

And vide
Pye v.
Gorge.
cited supra
250.
1 P. W. 129.
& vide
2 P. W. 682.
Cas. temp.
Talb. 260.
4 Durnf. &
East 64.

There are indeed cases, wherein a court of equity has refused to punish the trustees, for their concurring in a conveyance to destroy contingent remainders. As where upon a subsequent remainder to the *right heirs*, a *collateral relation* only has been affected by it, there having been no issue of the marriage; for next after the parties to the marriage, the court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as no immediate objects of consideration in the settlement. As also where the application to the court for relief, has been made by one who was not at the time, nor possibly ever might be entitled to the remainder, under the words of the limitation.

(253)

Thus, where previous to and in consideration of a marriage and wife's portion, and for settling the lands in the name and blood of the husband, a settlement was made, by a

Sir Thomas
Tippen's
case, cited.
1 P. W. 359.
1 Eq. Abr.
385. pl. 2.
Tipping v.
Piggott.

(254)

third person (not the husband) to the use of trustees for 99 years, in trust for the husband if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband; the husband wife and trustees afterwards, by fine &c. join in settling the lands to the use of the husband for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to wife for life, remainder to first and other sons of the marriage, remainder over to several others; the husband and wife died without issue, and his heir claimed the lands under the first settlement, and brought his bill to have the second set aside as a *breach of trust* by the trustees; Lord Chancellor held it so, as to the issue of the marriage; but that the remainder to the *heirs of the husband* was merely voluntary; and not to be aided in a court of equity; and so dismissed the bill.

Elfe v. Osborn, 1 P. W. 387. *supra* 32.

So where, in the case of a settlement to the use of *A.* for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the use of the heirs of his body, remainder to himself in fee; *A.* having two sons, *A.* and the

the trustees, and the eldest son when of age, joined in a mortgage of the land by feoffment and fine to *B.* in fee; the eldest son died without issue; and the second son in the father's life-time brought his bill to set aside the mortgage. Lord Chancellor was clear, that this limitation to the heirs of the body of *A.* was a contingent remainder, for *nemo est hæres viventis*; and that the feoffment, at law destroyed the contingent remainder; and said, that the trustees appointed to preserve the contingent remainders, ought not to join in destroying those remainders, which is acting the reverse of their trust; but that after all, the second son had no right to bring the bill in his father's life-time; for he neither was, nor possibly ever might be the heir of his father; as he could not, unless he survived his father, which was uncertain.

(255)

There are also instances, of a court of equity exercising a discretionary power, of directing trustees for preserving contingent remainders, even to join with the tenant for life, or his first son, in barring the subsequent contingent limitations. But this has only happened under peculiar circumstances; either of pressure to discharge incumbrances *prior* to the settlement; or in favour of creditors where the settlement was *voluntary*; or for the advantage of the persons who were the first ob-

jects of the settlement; as to enable the first son &c. to make a settlement upon an advantageous marriage.

Platt v.
Sprigg. 2
Vern. 303.

Thus where *A.* after mortgaging lands and confessing a judgment; settled those lands upon himself for life, remainder to trustees, to preserve contingent remainders, remainder to his wife for life, remainder to his first and other sons in tail, reversion to himself in fee; and afterwards having no issue, contracted for sale of the lands. Upon its being suggested that the trustees refused to join, and that the mortgagee threatened to enter, the trustees were decreed to join; the estate being an equity of redemption only, and there being no issue of the marriage, though the parties had been married six years, and the wife on examination in court consented to it. So where *J. S.* by his marriage settlement, being tenant for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to his first and other sons successively in tail male, remainder to trustees for a term for raising portions for daughters. *J. S.* having a son of age who was about to marry, they filed a bill against the trustees to join in making an estate for suffering a recovery, to enable the son to make a settlement on his marriage; and there being also a daughter, Lord *Harcourt* directed,

Frewin v.
Charleton.
1 Eq. Abr.
386. pl. 4.

upon giving security for the daughter's portion, that the trustees should join in the recovery.

And in the case of a *voluntary* settlement to the use of husband for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail successively, remainder to himself in fee. The husband contracting debts, afterwards conveyed the same land to other trustees for payment of these debts. The creditors brought a bill insisting (*inter al.*) that the trustees for preserving contingent remainders should join in the sale to destroy the contingent remainders; and (upon a precedent being shewn of such a decree) it was decreed at the Rolls, that the trustees should join to destroy the contingent remainders, and be indemnified; it being at the *suit of creditors*, and for raising of money for *payment of debts*.

Basset v.
Clapham,
1 P. W. 358.

Again, where lands were settled, upon marriage, to the use of husband for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to first and other sons of that marriage in tail, remainder to his first and other sons by any other wife, remainder over; there was one son of that marriage who was then of age, the father and son (the

(256)
Winnington
v. Foley,
1 P. W. 536.

wife being dead) brought a bill against the heir of the surviving trustee, that he might join in making a tenant to the *præcipe*, in order to a common recovery, for making a settlement upon the son's marriage, for which he was then in treaty. Lord Chancellor said, here being a *vested* remainder in tail, if this were for the good of the family, he did not see but that the trustee might lawfully join; but referred it to a master to see whether it were for the good of the family; who reported that it was a beneficial marriage for the family; and that it was necessary a new settlement should be made of the estate, which could not be done without a recovery.

(257)

Whereupon his Lordship observed, that it might be greatly mischievous to a family, if such a trustee should stand out; that it was plainly for the benefit of the family; for the son was going to be reduced to a tenant for life instead of a tenant in tail; so that it was a means of preserving the estate longer in the family; that the wife being dead, there was an end of the contingent remainders by that marriage; and as to any remainders by another marriage, no remainder not *in esse* ought to be so much regarded as this remainder in tail, which was actually vested in the son; and therefore he decreed that the trustee should join

join with the father and son, in barring the old and making a new settlement.

Here we may remark, that if a trustee joins with the *cestuique trust* in tail, in any conveyance to bar the intail; this is no breach of trust; for it is no more than what he may be compelled to do, though the *cestuique trust* himself might have barred such intail without his joining.

1 Eq. Abr.
pl. 1. in note
Caf. temp.
Tal. 166.
And Allington v. Boteler. 1 Bro.
Canc. Caf.
72.

And however the court may see proper to direct trustees to concur in destroying contingent remainders, under circumstances like those in the above noticed cases; it has repeatedly denied the same interposition, in cases where such ingredients were wanting.

Thus in the case of a marriage settlement on the husband and wife for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons in tail male; the husband and wife after being married twelve years without having had any issue, filed a bill against the trustee, that they might be enabled to sell part of the land for payment of debts. The Chancellor said, he did not know how to make such a decree; for he had known where people had been married near 20 years without issue, and after had children. Though at the

Davies v.
Weld.
1 Vern. 181.
1 Eq. Abr.
386.

Supra 255.

plaintiff's importunity, he gave time to attend him with precedents. — This case, we observe, was not that of a mere equity of redemption upon an *antecedent* mortgage, calling for a sale for discharge of it, like that of *Platt v. Sprigg*; nor the case of a *voluntary* settlement, like that of *Bassett v. Clapham*.

Townsend v.
Lawton,
3 P. W. 379.

And where lands were settled on the marriage of L. to the use of him for 99 years if he should so long live, remainder to trustees during his life to preserve contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage in tail successively: there were two sons by that marriage; and after the wife's death, the father and eldest son filed a bill against the surviving trustee, that he might join in making a tenant to the *præcipe*, for suffering a recovery in order to establish a mortgage, which had been made by the father since the settlement. Lord Chancellor asked, if the younger son would consent to the trustees joining as required; and upon being told he would not consent, his Lordship said, then he would not decree the trustee to join, for that he would not take away any man's right: and upon the above cited case of *Winnington v. Foley* being urged as an authority for what was desired, his Lordship said, he would do so, were the like case to come before him; that the trustee there

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there was decreed to join, in order to *preserve* the estate in the family; but here it was desired to have the same thing done with a view only to *alien*.

So where a bill was brought, to compel trustees to join in a sale, which would destroy the contingent remainders, and the uses in a settlement made before marriage. Lord *Hardwicke* said, there were cases in which the court would compel the trustees to join in such a conveyance, as would destroy the contingent remainders; but then it must be in some measure to *answer the uses originally intended* by the settlement; and had been usually done in the case of new settlements only, as in *Winnington v. Foley*; but he believed there was no instance, where, they had compelled such trustees to join, with the father termor for 99 years and the son, to sell *the estate*.

Symance v. Tattam.
1 Atkyns,
p. 613.

And where *A.* devised lands (in remainder after estates to his first son and his issue male) to his second son *B.* for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the first and other sons of *B.* in tail; remainder to testator's other sons and their issue male in like manner, remainder to *A.*'s

Woodhouse v. Holkins.
3 Atk. 22.

A.'s daughters, reversion to his own right heirs, *B.* having a son who had attained 21 years of age, and they having contracted debts, and being desirous of suffering a recovery to enable them to make a provision for their creditors; a bill was brought by the creditors against the several parties interested under the will, and the heir at law of the surviving trustee, to compel her to join in a recovery. — And upon its being argued, that if the trustee had joined voluntarily, it would not have been any breach of trust, as in 2 *Vern.* 754. and that in *Winnington v. Foley*, Lord *Macclesfield* decreed the trustees to join; Lord *Hardwicke* said, he was counsel in that case, and it was to make a marriage settlement, and so to *continue* the uses, in effect, of the old settlement; and after the uses of the new settlement were served, it went to the old uses; and he dismissed the bill.

Vide *Elie* or
Elfe, v. *Of-*
born. *Supra*,
p. 254.

Barnard v.
Large.
Cox's note.
2 *P. W.* 684.
1 *Bro. Canc.*
Cas. 534.
Ambl. 774.

And again, in a later case, of a devise to *B.* for 99 years if he should so long live, remainder to a trustee during the life of *B.* to preserve contingent remainders, remainder to the first and other sons of *B.* in tail male, remainder to *W.* in fee. — *B.* having only one son, who was tenant in tail under the will, and had attained 21, they were desirous of suffering a recovery, and limiting the estate, so as

to preserve the remainders, to the second and other sons of *B.*: but the trustee in whom the legal freehold was during *B.*'s life, having refused to join in making a tenant to the *præcipe*, they filed a bill against him for that purpose; submitting to declare the uses of the recovery, to the second and other sons of *B.* as limited by the will; and to limit an estate to trustees to preserve them. The Master of the Rolls observed, That all the persons claiming under the will, took as *volunteers*, and were *all* objects of the testator's bounty, the *last* remainder-man, as well as the first taker. That there was a discretion, between punishing trustees for joining in the destruction of contingent remainders, and compelling them to join — That it would be proper to see, by what rules the discretion given to the trustee was directed; in what cases he had been considered as warranted in joining, and what not — That the rules seemed sufficiently established; the trustee, though properly appointed only to preserve *contingent* limitations, was in effect a trustee, for all *vested*, as well as *contingent* remainders. But with respect to *vested* remainders, if they had been to remove relations on *settlements*, where the persons to whom they were limited, were not the immediate objects of the parties; or where they stand in opposition to the first tenant in tail, desiring a reasonable benefit, consistent with

with the intentions of the creation of the limitations; their pretensions had not been much considered. That in the principal case, *all* took as *volunteers*, and were *all equally* to be considered—That upon a view of the cases determined, the reason of them seemed to be; that where the eldest son, tenant in tail, was of age, and about to marry, and thus continue instead of destroying the purposes of the settlement, and in some cases where there had been particular distress under particular circumstances, which ought to have induced the trustees to act, there the court had interfered; but where no such circumstances had occurred, the court had refused to interfere. That in the principal case, he was called upon to disturb the testator's intention—merely to disturb it; no other object was offered. And his Honor dismissed the bill with costs.

We observe, that in the above case of *Woodhouse v. Hoskins*, Lord *Hardwicke* distinguished between the punishing trustees for joining, in some cases, to destroy contingent remainders, and the compelling them to join. Trustees of this kind, he said, had been called honorary trustees, and intrusted by parties to preserve contingent remainders. But he would not say, that if the trustee who was appointed in the case before him, should join, it would be such a breach of trust, as that court would decree

decree a satisfaction. But he said, tho' the court might not condemn the trustee, if he assented; yet it did not follow, that the court would compel the trustee. — So in the last cited case of *Barnard v. Large*, the Master of the Rolls adverted to the same distinction, when he said, there was a discretion between *punishing trustees* for joining in the destruction of contingent remainders, and *compelling* them to join. That the court proceeded according to the nature of the discretion, treating it as an *honorary trust*. — This, we must admit to be a distinction, that seems to flow from our supposing any discretion at all in the trustees, in cases of this nature; because there may be circumstances sufficient to justify, tho' short of an *obligatory call* for, such an exercise of their discretion.

But however this may be, it seems the safest way for trustees, not to act, except in the clearest cases, without the direction of the court. I should rather recommend to their attention the words of Lord Chancellor in the above cited case of *Pye v. Gorge*, "That it would be a *dangerous experiment* for trustees, in *any case*, to *destroy* remainders, which they were appointed by the settlement to *preserve*;" as well as the observation of *Reynolds, C. B.* in the above cited case of *Mansel v. Mansel*, "That whatever the

Cited P. W.
684.

Vide Caf.
temp. Talb.
259.

the *court* have done, or may do under particular circumstances; yet, they will never have it *left to the discretion* of a *trustee* to do it."

Vide 1 P. W.
129.
2 P. W. 682.
Caf. temp.
Talb. 269.
1 Atk. 591.
4 Durnf. &
East 64.

Green v.
Hayman.
2 Caf. Canc.
10. & 2 Rep.
Canc. 169.

Before I dismiss the notice of estates in trustees to support contingent remainders, it may be proper to observe; that although equity does not interpose in case of the destruction of contingent remainders, by tenant for life, where there is no *trust* in the case to bring it within the cognizance of a court of equity; yet it views such destruction of contingent remainders in the light of a wrong or tort which it is anxious to prevent; and consequently seizes every occasion, and makes every possible stretch for extending its protection against it. Thus a trust declared in a *will* to support contingent remainders, though annexed to an improper misplaced estate, has been rectified and transposed to effectuate the end.—As in a case where one devised lands to his eldest son *L.* for life only, remainder to the first, second, third, and fourth sons of the said *L.* in tail, remainder to two trustees for their lives, in trust for the better securing the several remainders limited unto the several sons of the said *L.* with remainders over; *L.* afterwards suffered a recovery, before any son born. And upon a suit, by a daughter claiming a portion under the uses of that recovery, against a son born after it; it was insisted, that the trustees

tees for preserving of the contingent remainders *being living*, the contingent estates were not barred by *the recovery*. To which it was answered, that the estate to the trustees was *after* and not *before* the estates to be supported; but the Chancellor held, that the law would manage and marshall the *will*, according to the *intent*, which there was, to *support the contingent remainders*; notwithstanding the estates being inserted after the contingent remainders; for if it was to stand so in construction of law, it would not preserve them; and therefore it should be construed before them. And accordingly dismissed the bill.

And we may remember, that in the case of *Stamford v. Sir John Hobart*, cited above, the Chancellor *inserted* a limitation to trustees to support contingent remainders, though not expressed or directed by the words of the will, or the Act of Parliament establishing it; these, we observe, were cases of *wills*, where all claim as volunteers. But in cases of articles, settlements, &c. for good and *valuable consideration*, the court has frequently gone as great or greater lengths, in transposing clauses or supplying words, &c. to effectuate the intent; as will appear from the cases referred to in the margin.

Supra 83.

And vide
Coriton v.
Hellier, cited
2 Vez. 195.

Vide Uvedale v. Halfpenny.
2 P. Wms.
151. and
cases cited in
Cox's note
there.

I may

4 Leon. 237.
pl. 363.

(259)

Ibid.

I may now proceed to a position which has been laid down, that any alteration in the nature of the preceding estate, before a remainder vests, will destroy that remainder. As if lands be given to *A.* in tail, and if *J. S.* come to *Westminster-hall* such a day, remainder to *J. S.* in fee, (it has been said) that if the lands descend to two coparceners who make partition, the fee shall not accrue to *J. S.* though he should come to *Westminster-hall* at the day. And it has also been said, that if lands be given to *A.* and *B.* for the life of *C.* remainder to the right heirs of the survivor of *A.* and *B.*, and *A.* release to *B.* the remainder is destroyed.

But notwithstanding these opinions, I conceive, that the alteration in the particular estate, which will destroy a contingent remainder, must amount to an alteration in its *quantity*, and not in its *quality*. This conclusion, I think, is warranted by two adjudged cases.

1 Roll. Rep.
238. 317.
438. vide
supra, p. 46.
Lane v. Pannel.

The first is that of *Lane v. Pannel* before cited; where it seems, that the severance of the jointure between two joint-tenants for life, did not destroy the contingent remainder, limited after their joint estate; for there it is adjudged, that because the remainder could not vest at the death of one of them (after the

the severance of the jointure), such remainder was gone as to *one moiety* of the lands: now this judgment was nugatory and groundless, if the *severance* itself destroyed the remainder as to the *whole*. This, it is true, was the case of a surrender of copyhold lands: but, however, no distinction at all was taken on that ground.

The other case was, where lands were settled to the use of *P.* and *S.* his daughter for their lives, remainder to the use of the first and other sons of *S.* in tail-male, remainder to her daughters, remainder to the heirs of *P.* *S.* afterwards and before the birth of a son, by deed released all her right and estate to the use of *P.* and his heirs. The question was, whether the contingent remainder limited to the first son of *S.* was destroyed by her release to her father? And it was adjudged, that the release by *S.* to *P.* (*i. e.* by one joint-tenant for life to another) did not destroy the contingent remainder to her first son.

Harrison v.
Belfey.

Raym. 413.

(260)

T. Jones 136.

1 Vent. 345.

Pollex. 573.

It is true, that if a lease be made to two with a condition to have fee, if they make a partition of the term, the condition is destroyed; but that turns upon a reason which does not at all affect a contingent remainder, *viz.* the requisite agreement in *quality* between the first estate and the enlargement to

8 Rep. 76. a.

(261)

accrue thereupon. The enlargement must accrue in the *same quality* in which the estate was first granted; for that was the *quality* of the estate conditioned to be enlarged: and it must not differ in *quality* at the time of enlargement from the estate enlarged; otherwise, instead of being an enlargement or extension of the estate *then in being*, it would in truth, be the accession of another estate of *different quality*, which would not be agreeable to the terms of the condition. But no such necessary connection seems to exist, between a remainder and the *quality* of the preceding estate. Whilst the particular estate continues the same in *quantity*, it continues to be the same estate as far as respects its relation to a remainder. If a release or severance between joint-tenants determine the old estate, then a vested remainder-man would be intitled to enter immediately upon such release or severance; but if notwithstanding such release or severance, it continues to be the *same* particular estate as to a vested remainder, why does it not as to a contingent one? No legal modification or alteration in the *circumstances* only of a particular estate, can be said to determine that estate: but the *determination* of the particular estate is the only point of connection between such estate and the remainder; therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect.

It is said by Lord Chief Justice *Hale*, in 2 Saund. 386. the case of *Purefoy v. Rogers*, that in all cases where the particular estate is merged in the reversion, there the contingent remainder is gone, though there be no divesting of any estate. As if there be tenant for life, remainder in tail in contingency, remainder in tail *in esse*; and the tenant for life, and he in remainder in tail *in esse*, levy a fine, this is no discontinuance no divesting of any estate, because each gives such estate as he has; and yet the mean contingent remainder is destroyed. Ibid. (262)

Now in regard to this rule, we are to observe, that wherever the union or coalition of the particular estate and the inheritance (except the circumstance of its being created by or arising under the same instrument or deed as the particular estate) happens by the conveyance or *act of the parties*, it seems the intermediate contingent remainders, depending on such particular estate, are destroyed; as in the above cited case of *Purefoy* and *Rogers*, where the contingent remainder was destroyed by the merger of the wife's estate in the reversion. But our books apparently differ with respect to the destruction of the contingent remainder, in cases where the inheritance becomes united to the particular estate by *descent*. Vide infra, p. 270. *Purefoy v. Rogers. Supra, p. 242.*

Plunket v.
Holmes.
1 Lev. 11.
Raym. 28.

(263)

Thus in the case of *Plunket v. Holmes*, it was resolved, that the descent of the fee on tenant for life, did not destroy the contingent remainder. The case was this; one devised lands to T. his eldest son for life, and if T. should die without issue *living at his death*, then to L. another of the testator's sons in fee; but if T. should have issue living at his death, then to the right heirs of T. for ever; the testator died, and it was resolved, that T. was tenant for life, (because the limitation over, was not upon a dying without issue generally, but was confined to a dying without issue *then living*), with the remainder in fee in contingency; and that the descent of the fee upon him, as heir at the death of his father, did not destroy the contingent remainder.

Boothby v.
Vernon.
9 Mod. 147.

So in the case of *Boothby v. Vernon*, it was taken for granted, that the contingency was not destroyed by the descent of the fee. A. devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue-male of her body living at the time of her death, then to such issue-male and his heirs-male for ever; but if she should leave no issue-male at her death, then to G. and his heirs for ever. The question respected the title of the testator's sister's husband, to be tenant by the curtesy of

of the lands so devised to her; and the court held, that the inheritance was never executed in possession in the sister during her life, (notwithstanding the inheritance descended on her) and therefore her husband could not be tenant by the curtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency. So in *Archer's* case, notwithstanding the reversion in fee must have descended on *Robert* the devisee for life, upon the death of his father the testator, yet he was adjudged to be only tenant for life, with contingent remainder to his next heir-male.

Archer's case.
1 Rep. 66.
Supra, p.
241.
(264)

On the other hand, in the case of *Wood v. Ingersole*, it is said to have been resolved, that the descent of the fee on tenant for life destroyed the contingent remainder; in that case it is said, three distinct parcels of land were severally devised by the testator to his three sons, and that if either of them should die, the *other surviving shall be his heir*; the eldest son died; and the reporter says, it was adjudged, that the fee descending on the eldest son at the father's death, had merged the freehold devised to him, and destroyed the contingent remainder. But there appears to have been a notable mistake in this report, both as to the state of the case, and as to the judgment; for it seems the words on the roll

Wood v. Ingersole.
Cro. Jac.
260.

1 Bullf. 61.
in the fame
case
T. Jones, 79.
Pollex. 481.
in the case of
Fortescue v.
Abbot.

Vide supra,
P. 170.

are, and if any of my sons die, the ONE to be the other's heir; which words were adjudged void for uncertainty, for there were two survivors, and consequently the above point did not come into question. As to the case of *Fortescue v. Abbot*, the remainder there was adjudged to be vested, and therefore the decision in that case does not affect the present point.

(265)

T. Jones, 76,
77.
1 Vent. 306.

But in the case of *Kent v. Harpool*, which as to the point in question was this: *A.* the father being tenant for life, remainder to his son *B.* for life, remainder to the first son of *B.* remainder to the heirs of the body of *A.*; *A.* died before any son was born to *B.*; the court held the contingent remainder to the first son of *B.* was destroyed by the descent of the estate tail on *B.* Of the same opinion was Lord *Hardwicke* in the case of *Hooker v. Hooker*, where lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to his daughters in tail, remainder to *A.* in fee; *A.* and his wife died in the life-time of *B.* who afterwards died without issue, leaving a wife; the question was, Whether the wife of *B.* was intitled to dower in the lands? And it was decreed she was; and Lord Chancellor, with one of the Judges,

Hooker v.
Hooker.
Rep. temp.
Hardw. 13.

Judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

These seeming differences in opinion, I apprehend, may be reconciled, by a distinction between those cases, where the descent of the inheritance is *immediate* from the person, by whose *will* the particular estate and contingent remainders were limited; and the cases where those estates were *not* created by the *will* of the ancestor, from whom the inheritance *immediately* descends on the particular estate; which happens, either in the case of a *mediate* descent from the person who devised the particular estate and contingent remainders, or else where those estates were not created by the *will* of any person, from whom the descent of the inheritance is derived. *Archer's* case and the cases of *Plunket v. Holmes*, and *Boothby v. Vernon*, are instances of the first sort. And if in the case of *Boothby v. Vernon*, we suppose the deviser to have left a son, who had died intestate without issue in the lifetime of the sister, to whom the particular estate was devised; in that case, the inheritance would first have descended from the deviser to his son, and from him to the sister; and consequently the descent of it on the particular estate of the sister, would not have been

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immediate from the devisor; and in such case, I apprehend, the descent would have merged her particular estate, and the inheritance would thereby have been executed in her in possession; and consequently, that the contingent remainder would have been destroyed, (for the reasons hereafter given.) The third sort is instanced in the cases of *Kent* and *Harpool*, and *Hooker* and *Hooker*.

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The reasons upon which I ground the above distinction are these: wherever a testator limits a contingent remainder, it is agreed that the inheritance descends to the heir only *till* the contingency happens; if so, nothing can be more absurd than to make such descent destroy the contingency. The *will* does not operate till the testator's death; the descent takes effect at the same time; so that, under such a construction, the particular estate given to the heir by the *will* arises and is destroyed in one and the same instant: and how is it destroyed? by the *descent* which that very same *will* permitted. This would be making a *will* and *no will* at the same time, and would, in effect, be saying, that a limitation of a particular estate in a *will* to a testator's heir at law, with a contingent remainder over, without any ulterior *vested* remainder, must be void in its creation. For it is evident that under such a construction, the particular

particular estate never can take effect at all, its existence and destruction commencing together; and *that* being destroyed, the contingent remainder over is also gone, before it has even a moment's chance for existence.— Now this would be making the will, in this respect, *ipso facto* void.

That estates created by devise, should be liable to the operation of future accidents, as much as if they had been created by any other instrument or conveyance whatsoever, appears but reasonable; for the nature of the same kind of estate when once created, is the same, whatever might have been the mode of its creation. But that is no reason at all, for rendering the limitations void in their very *creation*, and denying them even the possibility of ever taking effect. The general construction of *wills* forbids this, by giving effect to the testator's intention, so far as it can be done consistently with the established rules of law. And when in the case of a contingent remainder by devise, the law supposeth the fee to descend to the heir, *until*, or in *default* of, the contingency: it surely can be no violation of that law, to consider such descent as *conditional* and *imperfect*, where the giving it the force and effect of an absolute and perfect descent, would render the *will* originally and totally abortive. And therefore it seems to have

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Vide Raym.
28.

Vide supra
27. 56. 158.
infra 270.

(269)

have been rightly said by *Wyndham*, and agreed by all the court, in the case of *Plunket v. Holmes*, that until the contingency happens, the fee *descends* to the heir in *some sort*, but not to confound the estate for life, but so as to leave an opening for the interposition of the remainders, when they happen to interpose between the estate for life and the fee. The case seems nearly allied to that of estates arising under the same instrument.

Supra 265. 6.

But where the descent of the inheritance on the particular estate, is only *mediate* from the person whose *will* created the particular estate and remainder; or where the descent of the inheritance is otherwise clear of the first-mentioned circumstances; there can be no such inconsistency in supposing the contingency to be destroyed by the descent; for in all such cases the particular estate is created, and *takes effect*, with a capacity of being afterwards destroyed by those accidents to which the nature of such an estate is generally subject; such as forfeiture, merger, &c.; its immediate destruction is not necessarily involved in the mode of its creation, as it must be in the former case under the same construction. There can be no necessity, therefore, to exempt the particular estate in these cases, from the operation of merger by the descent, in order to give such particular estate any existence, as there is in the former case.

In

In the first case we observed the limitations could never possibly take effect, if the descent of the inheritance were allowed to merge the particular estate; in the latter cases they may take effect, though the descent of the fee be allowed its full force and operation; and when the particular estate has once taken effect, there is no more reason why it should be exempt from those accidental modes of destruction, to which the law subjects estates of the same nature in general; than there is in any other case, where the particular estate is merged, and a contingent remainder destroyed, by the accession of the inheritance: therefore in the latter cases the descent may well be allowed its full and usual operation.

(270)

Here we must distinguish between the cases, where a particular estate is limited, with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the *same* conveyance; and those cases wherein the accession of the inheritance is by a conveyance, accident or circumstance, *distinct* from that conveyance which created the particular estate. In the latter cases we have seen the contingent remainder is generally destroyed; in the former it is otherwise. For where by the same conveyance a particular estate is first limited to a person with a contingent remainder over to another,

Vide supra,
p. 27. 56.
158.

another, with such a reversion or remainder to the first person, as would in its own nature drown the particular estate first given him; this last limitation shall be considered as executed only *sub modo*, that is, upon such condition, as to open and separate itself from the first estate, when the condition happens; and by no means to destroy or preclude the contingent estate.

(271)

But whether, in case of a limitation to one for life, remainder to his first and other sons, &c. remainder to the *heirs* &c. of tenant for life; this last limitation is so executed in him as to entitle his wife to dower upon the husband's decease, *sans issue*, has been a question.

Cro. Eliz.
315.
Cordal's case.

For in the case of a devise to *A.* for life, remainder to his first son in tail, and so to his second, remainder to the heirs of the body of *A.*; it was resolved, that the possibility of the mean estate that might interpose, kept the remainder in tail during *A.*'s life so disjoined from his immediate freehold, that his wife could not be endowed.

Vide supra,
p. 265.

On the other hand, in the above cited case of *Hooker v. Hooker*, Lord *Hardwicke* with three of the Judges held, that even supposing after the descent of the fee upon *B.* there remained any possibility of the estates opening
to

to let in the contingent remainders, yet as the contingency had never happened, (and the husband being dead) never could happen, the wife should be intitled to dower, and he did not think that *Cordal's* case was law; and said it was denied, 2 *Sand.* 386. and also in another like case by *Bridgman*.

In another case* indeed, where *W.* was tenant for life, remainder to *J. S.* and his heirs for the life of *W.* remainder to the heirs of the body of *W.* remainder over; *W.* died without issue, leaving a wife; the question was, whether she was intitled to dower or not, *i. e.* whether the remainder in *J. S.* was such

Duncomb v.
Duncomb.
3 *Lev.* 437.
(272)

* The above noticed case of *Duncomb v. Duncomb*, suggests a mode of preventing dower's attaching upon purchased lands; which, at the same time that it puts the whole estate completely in the purchaser's power, without any recourse to the trustee, vests the legal freehold in him solely, and on his decease leaves the legal inheritance to his heir, absolutely discharged from the medium of any trust. For this purpose, the lands may be limited to the use of his appointees, &c. in the fullest manner; and in default of appointment, to the use of him and his assigns during his life: and from and after the determination of that estate, by any means in his life-time, to the use of some person and his heirs, during the natural life of the purchaser, in trust for him and his assigns: and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser, his heirs and assigns for ever.

an

an interposing estate between *W.*'s estate for life and his remainder in tail, as to prevent her being dowable; and though it was contended that the intail was executed in him, and that the remainder to *J. S.* and his heirs during his life, was only a possibility; yet the court upon the first argument adjudged the wife was not dowable. For we are to observe, this remainder to *J. S.* was an intervening *vested* estate, and not a possibility, as appears from what has been said in a preceding page: and this case was allowed to be good law by Lord *Hardwicke* in the above cited case of *Hooker v. Hooker*.

Vide *supra*,
p. 152. 275.
and vide
Vin. v. 18.
p. 415. this
case referred
to and recog-
nized.

Supra, p. 240.

I observed in a preceding page, that notwithstanding the particular estate might in some cases be revived, yet that the contingent remainder, if once it has failed for want of the existence of the preceding estate when the contingency happened, shall never after arise. As if there be tenant for life with contingent remainder over; tenant for life makes a feoffment in fee upon condition; if the contingency happens before the condition is broken, the remainder is destroyed, notwithstanding the tenant for life afterwards enters for condition broken. But, however, if the tenant for life enters for the condition broken before the contingency happens, the contingent remainder, it seems, may vest. But in that

Show *Caf.*
Parl. 151.
(273)

that case, if the reversioner enter for the forfeiture, before the contingency happens, then is the contingent remainder destroyed—*Per Holt* Chief Justice.

2 Salk. 577.
1 Ld. Raym.
314.

As to the remainder's vesting, if the tenant for life enters before the contingency happens, there is a contrary opinion delivered in *Bacon's Abridgment*: where it is said the contingent remainder shall never arise, tho' the condition be broken, and a re-entry made before the contingency happens; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the recovery does not purge the forfeiture. This seems to have been the opinion of Chief Baron *Gilbert*, as I find it laid down in the same words in his manuscript treatise, to which I have before referred. He cites *Caf. in Parl.* 151. But that authority does not seem to warrant so much, as it does not put the case of a re-entry *before* the contingency happens. The ground of the opinion is evidently this; that notwithstanding the re-entry of tenant for life, the effect of the forfeiture still remains, so as to intitle the reversioner to enter. Now, it may be asked, if the estate still continues forfeited, how can it be supposed to subsist any more, after the re-entry, than immediately after the feoffment from which the forfeiture commences? And where

Bac. Abridg.
v. 4. P. 315.

Supra, p. 58.

Vide 1 Inst.
252. a.

(274)

where then is there a particular estate in the one case, to support the contingent remainder, any more than in the other ?

But notwithstanding this reasoning, it seems upon the whole, that Lord Ch. Justice *Holt's* opinion is agreeable to law : for both Lord *Coke* and *Rolle* tell us, that if lessee for life make a feoffment upon condition, and afterwards enter for breach of the condition, it will reduce the reversion to the lessor, and the estate for life will be restored ; though still subject to the entry of lessor for the forfeiture ; just in the same manner indeed as where the forfeiture is committed by acceptance of a fine &c. from a stranger, and no divesting of the remainder, or alteration of the particular estate occasioned thereby. And though there seem to be some errors in the references by Lord *Coke* and *Rolle* to the year books, as to their application to this point, yet I find two cases in the year books (one indeed cited by Lord *Coke*) where that point is laid down *arguendo* on one side, and admitted by the other side : from whence it seems, that after re-entry for condition broken, the lessee for life is tenant for life again, as long as the lessor does not enter upon him for the forfeiture ; so that if the contingency happen during that interval, the contingent remainder may well vest.

1 Inst. 202. b.
1 Roll. Abr.
474. P. d. pl.
4. 5.

Vide supra,
P. 247.

39 Affis. pl.
15. 4 H. 6.
page 15. b.

2. The case is, that A. by his will devised
Sept. 1002. devised to B. & C. in
named & the survivor of them & the heirs
of such survivor all his mesuages land
tenement & hereditaments &c. in tract
to all." in effect

Then it stated, that a person who had
agreed to purchase ^{part of the property} & elected to take the
title from the two trustees for sale, without
having the concurrence of the ex-
tor's heir, & that such ~~an~~ heir was
a minor.

Then it was argued in favour of the
sufficiency of the trustees to convey
the fee; & I am referred to author-
ities in support of this, namely, 1. Term.
Conting. Rem. & Ed. 203. 204. & 205.
& Goodtitle & Layman there cited &
Pearne's Posthumous 151. & W. Butler's
Trust Co. Litt. at 191. a.

Then this there is the following
question.

"Your opinion is requested ^{merely}
whether or not the concurrence
of the heir at law as required
is necessary to make a title to
a purchaser."

Opinion.

~~The~~ I could have wished, that the state-
ment of the will had not been so very
short. But my impression ^{in trust} is, that the devise
includes a power of selling ^{the fee} & that
the difficulty from putting the remain-
der into contingencies ~~it~~ it may be

X ground
I have stated
be not adopted

11 Feb. 1809.
(W. Smith
of Bump Court
Example)

by appointment in
obviated ~~under the~~ ~~the~~ ~~of~~ ~~the~~ ~~execution~~ ~~of~~ ~~the~~
power: & that in ~~this~~ ~~view~~ ~~the~~ ~~concurrent~~
of the heir of the testator ^{with the testator} ~~is not~~
necessary. ~~But~~ ~~this~~ ~~case~~
even in ~~this~~ ~~respect~~ ~~I~~ ~~cannot~~ ~~at~~
~~repeal~~ ~~upon~~ ~~this~~ ~~point~~ ~~I~~ ~~am~~ ~~aware~~ ~~of~~
present say, that I am aware of
it being quite of a decisive ~~the~~ ~~case~~
doctrine as quite settled: ~~if~~ ~~this~~ ~~case~~
so far from being ~~there~~ ~~are~~ ~~other~~
points depending ~~on~~ ~~the~~ ~~issue~~ ~~of~~ ~~the~~ ~~case~~
of ~~the~~ ~~sort~~ ~~of~~ ~~both~~ ~~diff~~
of considerable intricacy & ~~that~~ ~~of~~ ~~the~~ ~~doctrine~~
-ent & ~~of~~ ~~the~~ ~~upon~~ ~~a~~ ~~of~~ ~~the~~ ~~doctrine~~
of as to ~~the~~ ~~putting~~ ~~up~~ ~~of~~ ~~the~~ ~~doctrine~~
the remainder ~~on~~ ~~new~~ ~~doctrine~~ ~~in~~ ~~the~~ ~~remainder~~
obeyance by limiting remainder, & as to
preference in contingent, & as to
extinguishing passing estates by ~~as~~ ~~to~~ ~~as~~
& also depending upon ~~as~~ ~~to~~ ~~as~~
the disposal of ~~of~~ ~~contrary~~ ~~to~~ ~~be~~
authorities, ~~it~~ ~~will~~ ~~become~~ ~~necessary~~ ~~to~~ ~~be~~
considered. In short ~~this~~ ~~case~~ ~~is~~ ~~very~~ ~~complicated~~
point of view ~~with~~ ~~which~~ ~~this~~ ~~case~~ ~~is~~ ~~very~~ ~~complicated~~
includes ~~is~~ ~~not~~ ~~the~~ ~~one~~ ~~of~~ ~~the~~ ~~most~~ ~~difficult~~
being ~~is~~ ~~one~~ ~~of~~ ~~the~~ ~~most~~ ~~difficult~~
~~extent~~ ~~of~~ ~~consideration~~ ~~of~~ ~~great~~
difficulty & ~~of~~ ~~great~~ ~~difficulty~~
extent & difficulty &

Mr. H. 11. Feb. 1809.

Other Properties of Contingent Remainders.

BEFORE I conclude this tract of contingent remainders, it remains for me to notice certain other properties belonging to them, which could not properly be brought in, under any of the foregoing general heads. First, I shall observe, that where a remainder of inheritance is limited in *contingency* by way of *use*, or by *devise*; the inheritance in the mean time, if *not otherwise* disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens, to take it out of them.

Thus, where one made a feoffment to the use of such person and persons, and for such estate and estates, as he should limit and appoint by his last will in writing. One of the resolutions in the case was, that where a man makes a feoffment to the use of his last will, he has the use in the mean time.

Sir Edward
Clere's Case,
6 Co. Rep.
17. b.

And where a feoffment was made to the use of feoffor for his life, and afterwards to the use of such tenants, as he should demise any part of the premises to for life or years &c. and afterwards to the use of the performance of his will, and to the use of such person and

Leonard
Lovie's Case,
10 Co. Rep.
78. 85. b.

Vide of a
power not
suspending
the vesting
of a subse-
quent limita-
tion, *supra*,
p. 162.

(276)

Beck's case,
alias Burton
v. Nichols.
Lit. Rep.
159. 253.
285. 315.
344.
Cro. Car.
363.

persons, to whom by his will he should devise any estate or estates in the premises; and after performance of his will to the use of several persons successively in tail, and ultimately to the use of himself and his heirs for ever. The Chief Justice held, nothing vested till the death of the feoffor, because he had power by his will to devise to any person, be it in fee simple, if he pleased; from whence it followed, that in the mean time the use of the fee vested in himself.

And where, upon a feoffment by *B.* to the use of himself for life, remainder to the use of *J.* for life, remainder to the use of the first son begotten of the body of *J.* that should have heirs-male of his body, and to his heirs *in perpetuum*, and in default of such issue of his body, to the use of the first daughter of *J.* which should have issue begotten of her body, and for default of such issue, remainder to the right heirs of *J.*; *J.* levied a fine before he had a son that had issue-male; upon which the heir of *B.* entered for the forfeiture.

Two points arose in this case; first, whether the limitation to the first son of *J.* who should have any heirs-male of his body &c. was a contingent estate-tail or in fee? And if it were in fee, then secondly, as it was contended that the subsequent limitation to the right heirs of *J.* must in that case be contingent,
(upon

(upon the principle that no subsequent limitation is capable of *vesting* after a contingent fee limited before) whether the fee remained in the feoffor and his heirs in the mean time, so as to entitle the heir to enter for the forfeiture? Two of the Judges seemed to incline to the affirmative opinion; and held, that in case of a lease for life, remainder to the right heirs of *J. S.* and tenant for life, makes a feoffment in the life-time of *J. S.* the lessor might enter; though *Croke* cited a case to the contrary, which *Yelverton* denied to be law. However, the court after several arguments decided the case on the first point; and agreed that the limitation to the first son &c. of *J.* gave such first son only an estate-tail; and consequently, that the subsequent remainder to the right heirs of *J.* became vested in him; according to the general rule before treated of in this essay, and the doctrine established in the case of *Loddington v. Kime*, that a remainder to a person *in esse*, (as that to the heirs of *J.* here was, it being a remainder in *him*, as he took a preceding life estate) may vest, if the preceding contingent remainder be not in fee; and therefore the court came to no resolution as to the latter point; though the opinion of *Hutton* and *Yelverton* seems to have inclined as I have mentioned.

Vide supra,
p. 61.
(277)

And infra,
296. Doe v.
Reason.

Supra, p. 21.

Supra, p. 161.
and Doe v.
Holmes.
Infra, p. 273.
(278)

Carth. 262.

And *Holt*, Chief Justice, in the case of *Davies v. Speed*, said, that where a feoffment is made to the use of *A.* in tail, remainder to the use of the right heirs of *T. S.* who is then living; the fee-simple is not in abeyance, nor in the feoffees, but results to the feoffor and remains in him, till the contingency, (*viz.*) the death of *T. S.* happens.

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Raym. 28.
Plunkett v.
Holmes.
Supra, p. 262.

So where the inheritance is devised in contingency, it descends, if not otherwise disposed of, to the testator's heir, till the contingency; as where *A.* devised lands to *B.* his heir, for life, and if *B.* should die without issue living at his death, that then the same should remain to *C.* in fee; but if *B.* should have issue living at his death, then the fee should remain to the right heirs of *B.*; it was resolved that *B.* took an estate for life, with remainder in fee in contingency; and it was said by *Wyndham* and *Twisden*, and agreed by the other Judges, that the fee descended to *B.* as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance; that in relation to *C.*, *B.* took only an estate for life; but in the mean-time, by operation of law, he had the fee in such sort, as that there should be an *hiatus* to let in the contingency, when it happened. And that in *Archer's* case, though

1 Rep. 66.
Vide supra,
p. 102. 241.

Robert

Robert took an estate only for life by the will, (280)
yet by operation of law he had the fee also.

So in the above cited case of *Purefoy* and *Rogers*, where *S.* devised lands to his wife for life, and if it should please God to bless her with a son, and she should call that son by the testator's christian and surname, he gave the inheritance of the lands to him after his mother's life, and if he died before he came to twenty-one, then the testator gave the inheritance of his lands after his wife's life to his the testator's heirs for ever. Before any son was born the heir of the testator conveyed the estate to the wife and her second husband by fine.—*Saunders* urged, that the contingent remainder to the son was not destroyed, for that at the time of the fine, the heir of the testator had no reversion or estate in him; for that an estate for life was devised to the wife, and the remainder in fee was devised to her son upon a contingency; so that until it could be known whether such contingency would happen or not, the reversion must be in abeyance and not in the heir; and then his conveyance gave no estate to the husband and wife, but they were only tenants for life of the wife as before. But *Hale*, Ch. Justice, interrupted him, and said it was clear that the reversion was in the heir of the testator by descent, and not in abeyance; and accordingly

Purefoy v.
Rogers.
2 *Sanders*
380. and vide
supra, 242.

(281) it was adjudged, that the contingent remainder was destroyed.

Supra, 170.
264.

Indeed the doctrine of the descent of the fee till the contingency happens, seems to have been clearly admitted in both the above cited cases of *Fartescue v. Abbot*, and *Wood v. Ingersole*.

1 P. W. 505.
Carter v.
Barnardiston.
2 Bro. Cas.
Parl. 1.

So where *A.* devised to *C.* for life, and in case *C.* should have issue-male, then to such issue-male and his heirs for ever, and after the death of *C.*, in case he should leave no issue-male, then to *D.* in fee. After the testator's decease, *C.*, before he had any issue, suffered a common recovery of the lands; it was clearly held, that these remainders after the death of *C.* were contingent, and consequently barred by the recovery of *C.* before they vested; and then the question arose, whether the remainder in fee was in abeyance, or did descend to the testator's heir at law?

The Master of the Rolls considered the fee as in abeyance. He strongly argued against the notion of the fee's descending (in that case at least) to the heir at law of the testator, till the contingency happened; yet admitted, that where one devises lands to *A.* for life, remainder to the right heirs of *J. S.* then living, though the remainder in fee is in abeyance,

abeyance, yet there is a possibility left in the heir; and that this was plain even in the case of a grant; and that this possibility seemed such an interest as intitled the donor to enter for the forfeiture made by tenant for life: for that his estate was as much determined as it would have been by his death; and that it was absurd that a tenant for life by an unlawful act, *viz.* by his destroying the contingent remainder, should gain to himself an indefeasible fee-simple; that it was like the possibility that was upon a grant at common law to a man and the heirs of his body: for there though the grantor had no reversion, yet he might enter when the grantee died without issue.

But upon an appeal to Lord Chancellor *Parker*, he made a point of reprobating and exploding that notion; and held, that nothing but necessity could, in any case, support the admission of it; that there could be no other reasonable pretence for it, but to preserve the remainder; but he said the construing the fee to be in abeyance, would on the contrary tend to the destruction of the remainder; that it was held, where the remainder was devised in contingency, the reversion in fee descended to the heir at law in the mean-time; and that whatsoever estate was not disposed of by the testator, descended to the heir;

(282) and he said, he should abide by that opinion, and was very clear in it. — That it was a strange construction to take pains, by a strain in law, to place a remainder *in nubibus* or in *abeyance*, on purpose that the testator's intention should be wholly frustrated; and that the tenant for life might be under the temptation to disappoint the will, by destroying the contingent remainder by a recovery or feoffment; which in such case must be admitted to be tortious conveyances; nay, what was still more extraordinary, that the tenant for life must be rewarded for this wrong; and that he who before had but an estate for life, should gain an absolute and indefeasible fee-simple; and this by doing a wrongful act; which would be taking advantage of his own wrong, both against law and reason. — That upon the recovery suffered by C., he being but tenant for life, the co-heirs of the testator having the reversion in fee *descended* to them, they had a right of entry commencing upon such forfeiture of C.

Loddington
v. Kime.
1 Salk. 224.
1 Ld. Raym.
209.
Supra p. 160.
& vide 2 Bro.
Cas. Parl. 15.

So the Court of Common Pleas, upon the same case referred to them out of Chancery, were clear as to the destruction of the contingent remainders by the recovery suffered by C.; and that he thereby gained a tortious fee, good against all persons but the right heirs

heirs of the testator; which was admitting (283)
that a right descended to them.

It may indeed be said, that in a subsequent case Lord *Talbot* does not seem to have adverted to this point; but rather to have accorded with the doctrine of the Master of the Rolls, in *Carter v. Barnardiston*. It was a case where lands were devised to two trustees, and the survivor of them, and the heirs of such survivor in trust to sell. And upon its being objected, that the parties could not make a good title, because the fee was not in the trustees, but was limited to the survivor, and it was uncertain who would be the survivor; his Lordship held, that the trustees joining in a fine would pass a good title to the purchasers by way of estoppel: that here the fee was in abeyance; and it was certain that one of these two trustees must be the survivor, and intitled to this future interest, and consequently his heirs would be barred by the fine of their ancestor.—And it being said by the counsel that the heir of the devisor would join in the conveyance; his Lordship said, that the heir's joining would supply the want of proving the will, but that in every other respect it would be void. And afterwards he cited the case of *Weal v. Lower*, where a fine was adjudged to pass an estate not vested, by way of estoppel.

Vick v. Edwards.
3 P. W. 372.

Vide Butl.
Note, 1 Co.
Lit. 191. a.

(284)
Vide infra
p. 287.

Now

Now upon this case three material observations arise; first, that as the heir at law agreed to join, the question respecting the necessity of his concurrence was not debated; secondly, that in the case of *Weal v. Lower*, the fine was levied by the remainder-man, and did not at all affect the particular estate; whereas in the principal case the question would have been, whether the fine of the trustees being tenants for life, would not have destroyed the contingent remainder in fee to the survivor; and thereupon have given the heir of the testator a right of entry for the forfeiture, agreeable to the doctrine held in the above cited case of *Carter v. Barnardiston*; thirdly, that the devise here being to the trustees in trust to sell, would have carried, in the very nature of the trust, such an estate as should enable the trustees to perform the trust, by disposing of the fee, in exclusion of the heir at law; supposing the devise to them had been indefinite, without any words of limitation at all, either to the survivor or the heirs, &c.

The summary authority of *Vick v. Edwards*, has introduced the habit of considering a devise of lands to trustees and the survivor of them, and the heirs of such survivor in trust to sell &c. as giving such trustees a joint estate for life, with a contingent remainder in fee

fee to the survivor of them; together with the consequent practice of requiring a *fine* from them, to bind such contingent interest by way of estoppel. But the operation of such a devise, in giving the trustees only an estate for life, with a contingent fee to the survivor; and the necessity for a fine from them, seems at least problematical; considering the strong ground afforded by the nature of the trust, for construing the fee to pass to the trustees *absolutely*, even without any words of limitation; according to the general doctrine of the fee's passing by an indefinite devise; where the extent and execution of the trust reaches the *whole fee*; as that for a sale and disposition of the lands clearly does.

The first words alone, it seems, would, from the nature of the trust, have carried the fee to the trustees; the latter words do not give it *from them*; which indeed would have been an express *negative* upon the constructive operation of the first. But their effect is included in that of a devise to the trustees and their heirs; inasmuch as they expressly direct the *fee* to the *same person* as such a complete limitation, would ultimately carry it to, *viz.* the survivor of the trustees. The limitation therefore to the *survivor and his heirs*, does not contradict the construction of a joint fee; it is merely *deficient in expression*,
by

by stopping short of the intended extent ; as in the case of a devise, without any words of limitation, though not *so short* as *that* does. And why is not the less *deficiency* to be supplied, by construction on the nature of the trust in one case, as well as the greater in the other ? I have the note of a modern case, where even in a devise to three persons (not as trustees but beneficial devisees) the apparent *intent* that they should take the *fee jointly*, ruled the construction ; notwithstanding the fee was expressly limited only to the survivor ; it was a devise, to three persons, to have and to hold to them as *joint-tenants* and the survivors and survivor of them and the heirs and assigns of such survivor for ever. And the court of King's Bench held it to be a joint-tenancy in fee.

Goodtitle v.
Layman in
K. B. Trin.
Term.
12 Geo. 3.

But admitting the nature of the trust, were not held to supply the deficiency of the words of limitation, and carry the immediate fee to the trustees by implication : Still that trust, at least, imports a *power* of conveying and disposing of the *fee absolutely*, to effectuate the declared intent and direction of the testator, for making the sale and disposing of the estate, which was the subject of the trust ; and then, the purchaser would come in *under the will*, in exclusion as well of the heir

heir of the testator, as of the heir of the surviving trustee.

And supposing such a devise made, *not to trustees* but to *beneficial devisees*; and that the limitation indisputably gave them a *joint estate for life*, with a contingent remainder in fee to the *survivor*, suspended till such survivor became ascertained, by the death of his co-devisees; even in that case, the concurrence of the *heir at law* would, it should seem, preclude the *occasion* of a *fine*. For the heir's joining in a conveyance with the several devisees then seised of the particular estate *supporting such contingent remainder*, would merge that particular estate, destroy the remainder, and complete the title by passing the fee from the heir at law to the purchaser.

Vide *Parefoy v. Rogers*.
Supra p. 280.

Upon the whole, therefore, the opinion in the case of *Vick v. Edwards*, does not appear to have been the subject of sufficient consideration, to be relied on as an authority against the doctrine, relative to the *descent* of the inheritance to the testator's heir; which appears to have been so directly and fully established, by the several cases I have examined in regard to it; and is confirmed by other cases cited in the sequel of this essay.

(285)

Vide *infra*,
396. 398.
431-2-3.

To

To dispute the descent of the inheritance to the heir at law of the testator, in the case of a contingent remainder created by will; would be sacrificing the authority of a series of cases, wherein that point has been solemnly decided and repeatedly recognised after the maturest discussion; to the occasional opinion of Lord Talbot in *Vick v. Edwards*, where that point was not debated, nor the direct subject of decision; and the arguments of the Master of the Rolls in *Carter v. Barnardiston*, whose opinion was over-ruled on the appeal to the Chancellor in the same case, and by the court of King's Bench in *Lodding-ton and Kime*. *See vol. 1. of my Law Books within about eleven pages of the end in opinion of Mr. Chas. J. J. in which he prefers Sir Joseph Popham's opinion.* *W. X.*

I have hitherto confined my observations on the doctrine of the continuance of the inheritance in the grantor and his heirs, to cases of conveyances by way of *use*, and dispositions by *will*. For different opinions have prevailed in respect to its admission in conveyances at common law.

Some have held, that in case of a lease for life, remainder to the right heirs of J. S. then living, no estate at all remains in the grantor; and that he cannot enter for the forfeiture, in case of a feoffment of the tenant for life; whilst others, though disinclined to admit that any estate remains in the grantor

in

in such case, still allow him a right of entry for the forfeiture, upon a feoffment by the tenant for life; no less than on the determination of his estate by death, before the contingency happens. These opinions are founded on an assumption, that the remainder *must pass out of the donor*, at the time of the livery; and consequently that no estate shall remain in him after such livery; and therefore in the case of a lease to one for life, remainder to the right heirs of *J. S.*; the remainder, they tell us, is in *abeyance*, or in *nubibus*, or in *gremio legis*; though by way of some sort of compromise between common sense, and the supposition of an estate passing out of a man, where there is no person *in rerum naturâ*, no object besides *hard* and *hardly intelligible* words for the reception of it, at the time of the livery; they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place, intitles the grantor or his heirs to enter and re-assume the estate.

Vide Plowd.

25, 29, 35,

554, 556,

563.

Co. Lit. 342,

b.

1 P. W. 515,

516.

Thus in case of a lease for life or in tail, remainder to the right heirs of *J. S.* if tenant for life dies, or tenant in tail dies without issue living *J. S.* it is laid down, that as the heirs of *J. S.* can never take, therefore the donor shall have the land again. What is this,

2 Roll. Abr.

418. pl. 1, 2.

this, in effect, but admitting, that no more actually passed out of the grantor, than the estate to the tenant for life or in tail, until and unless J. S. died before the estate of such tenant determined?

But still, some denied the right of entry of the donor for a forfeiture of the tenant for life; as in the case put by *Croke* in *Beck's* case, *Lit. Rep.* 160. whilst others held a contrary doctrine; agreeable to the opinion of *Yelverton* and *Hutton* in their arguments on the same case; and that of the Master of the Rolls in *Carter v. Barnadiston* above noticed.

Supra 281.

Now, without entering into the grounds of distinction between the determination of the estate for life by *forfeiture*, and by *death* of tenant for life; it must be an object of no small curiosity, to understand, how a remainder can pass from a donor until there exists some donee to receive it of him; if it passes at all, the conclusion rather seems to be, it passes to somebody; and whilst it does not pass to any body, one might suppose it does not pass at all. And, however profound a solution of this difficulty, may be discoverable by adepts in legal lore, under the expressions "*in abeyance*," "*in nubibus*" or "*in gremio legis*," I cannot but think it a more arduous undertaking, to account for the operation of a feoffment

or

or conveyance, in *annihilating* an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event; than to reconcile to the principles, as well of common law as of common sense, a *suspension* of the complete or absolute *operation* of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of *such inheritance* comes into existence; in any case at least, where a present estate of freehold passes in the mean time, as the immediate and initiate subject of the operation of such conveyance. The doctrine of estates to be enlarged upon condition, may be referred to for such a principle, as no new thing in our law; and the several cases cited by Lord *Coke* against the opinion of the fee-simple passing before the condition performed, in case of a feoffment to one for years, upon condition to have an estate of freehold or inheritance on payment of a certain sum, &c. shew, that there was no such universally allowed absurdity, in the texture of our common law, as to prevent the inheritance continuing in the grantor, where there was no passage for its transition, open at the time of the livery.

Vide Co. Lit.
216. a. 217,
218. a.

Indeed, *Hales* Justice, in the case of *Colthirst v. Bejusbin*, utterly denied what had

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been

Plowd. 31. a.

Brook. Read.
on Stat. Lim.
84.

been alledged, that the remainder ought to *pass out of the lessor* at the time of the *feoffment*; and put several apposite cases, to prove that at common law, a freehold, by agreement had upon the livery, might be *transferred* from one to another, by matter *ex post facto*, without passing out of the donor at the time of the livery. And *Brooke*, I observe, states a case directly to this point; *viz. A.* makes a lease for life on condition that if the lessee has issue in his life the land shall remain to *W.* in fee; *A.* recovers against the lessee by writ of waste, and has execution, lessee has issue and dies. No action of *formedon* accrues to *W.*; because the fee *remained* in *A.* until lessee had issue, and then the recovery defeated the first limitation.

Vide supra,
p. 190.

It may be proper to caution the reader, against confounding this last cited case, with the instances of limitations over on *conditions to defeat* the particular estate; for, here the word *remain* applies, *as to the possession*, to the expiration of the lessee's estate for life, and means a commencement only *in interest* upon his having issue in *A.*'s life-time.

Supra, p.
115.

Gilbert in the manuscript treatise before referred to, after stating the case of a lease for life, remainder to the right heirs of *J. S.* then living, and adopting the position of the remainder's

remainder's, being in abeyance, that is, as he says, in no person but in *nubibus*, because the donor has limited it out of him, and all remainders must pass out of him at the time of the limitation; observes, it may be objected, that then such remainders ought to escheat to the lord; as well as where his tenant dies without heirs; for they actually passed out of the tenant; and though they could not vest in the persons intended; yet, it was not reasonable they should return to the feoffor, against his own grant, and when he had by his own act parted with, and given them away; but the lord ought rather to have them by escheat. In answer to which objection, he says, it is to be observed, that the reason of the escheat is the death of the tenant without heirs, and that so are the words of the *præcipe*; but nothing vested in J. S. or his heirs, and therefore, the lord could have no escheat as from them. And as to the feoffor, he or his heirs were still *in esse*; and since the grantee could not take the remainder, and no other person had a right to claim it; it must return back again, and settle in the feoffor, as if no disposition had been made.

Fitz. N. B.
144.

Now what does such answer, to the objection, plainly amount to, more or less, than, that the feoffor and his heirs, still con-

tinued *tenants to the lord*; because neither the grantee nor any other person in the world, having acquired any right under the limitation of the remainder, it was as much out of the case, and the feoffor and his heirs as fully intitled, as if it had never been made? To whom then, could it ever have passed out of the grantor? And from whom could it ever return to him? Where is the sense, in saying, a remainder must pass out of the grantor, in a case where you deny it ever passed at all to the grantee or any body else? Or that livery must have its immediate operation, in a case where it is admitted to have left the estate in the same plight exactly as if it had never been made at all? Would there not be better sense in considering the disposition itself, in all these cases, as put in suspense, till the event or contingency referred to, decides its effect? What is there to move the subsisting estate in the lands from the grantor, before the alienation of it takes effect? That alienation, may indeed rest in abeyance or expectation, till the contingency or future event gives it operation. And it is that, rather than the respited inheritance, to which, during its mere potential undecided operation, the allusion of—*caput inter nubila condit*.—seems most applicable.

Vide Co.
Lit. 342. b.

In short, to bring this doctrine to the test of common reason, we may state it thus: A man makes a disposition of a remainder or future interest, which is to take *no effect* at all until a future event or contingency happens; it is admitted that *no interest passes* by such a disposition to *any body*, before the event referred to takes place. The question is, what becomes of the *intermediate* reversionary interest, from the time of the making such *future* disposition until it *takes effect*? It was in the grantor or testator at the time of making such disposition; it is confessedly not included in it. The natural conclusion seems to be, that it remains where it was, *viz.* in the grantor or the testator and his heirs, for want of being departed with to *any body else*. —When the future disposition takes effect, then the reversionary or future interest passes pursuant to the terms of it; but if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise; what is there then, to draw the estate which was the intended subject of it, out of the grantor or his heirs, or the heirs of the testator? Or who can derive title to an estate, under a *prospective* disposition, which confessedly never takes any effect at all?

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Weale and
Lower.
Pollexf. 54.

Another observation is, that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens. This appears as well in the above cited case of *Vick v. Edwards*, as in that of *Weale and Lower* stated in the next page.

1 Rep. 99. a.
Wood's case
there cited.

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Vide Gurnel
v. Wood.
Vin. v. 8. p.
112. ca. 38.
1 Vezey, 47.
237.
And vide
Wilson v.
Bayly.
5 Bro. Caf.
Parl. 388.
Infra, 446.
et seq.

The same law, it seems, holds with respect to future uses, as where *A.* seised of the manor of *S.* covenanted with another, that when *J. S.* should infeoff him of the manor of *D.* that he would stand seised of the manor of *S.* to the use of the covenantee and his heirs. The covenantee died, *J. S.* enfeoffed the covenantor, and the heir of the covenantee was adjudged to be in, in course and nature of a descent. And in general it seems, that *contingent* interests pass to the real or personal representatives, according to the nature of such interests, as well as *vested* interests, so as to entitle such representatives to them when the contingencies happen.

But some cases may arise, where the *existence* of the devisee, &c. of the contingent interest, at some *particular time*, may by implication enter and make part of, the contingency itself, upon which such interest is intended to take effect. As in a modern case
of

of a settlement of the wife's lands, on herself for life, remainder to her husband for life if any issue of the marriage should so long live, remainder to all the children in fee; and if she died without issue, or such issue died under twenty-one, then as to one moiety to the husband in fee. The court of *King's Bench* held, that upon all the circumstances of the case, the contingency on which the husband's estate in fee was to arise, was that of his surviving (*viz. living at the death of*) his wife, and that as he died first, the contingency never arose.

Moorhouse
v. Wainhouse
1 Black. Rep.
638.

We are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency. As where *A.* made a feoffment to the use of himself for life, and after the death of himself and *M.* his wife, to the use of *B.* (his eldest son) for life, and after the death of *A. M.* and *B.*, to the use of *B.* and the heirs-male of his body, and for default of such issue, to the use of the heirs of *B.*; *B.* had issue a daughter, and then by fine and indenture granted to *D.* for 500 years, to commence after the death of *A.*; *B.* died, *M.* died, *A.* survived; it was held that the estate limited to *B.* was a contingent remainder; for the particular estate was only for the life of *A.* whereas *B.*'s estate was not

Moor 554.
pl. 750.

Pollex, 54.
Weale 4.
Lower.

Vide supra,
p. 229.

(288)

to commence till after the death of *A.* and *M.*, and though *B.* levied the fine for 500 years and died, before the contingency happened; yet his heir afterwards, when the contingency happened, was bound by the fine, and the lease for 500 years to *D.* took place; for it was agreed that the contingent remainder descended to his heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel should bind the heir; that upon the contingency the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied; that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger; but being only for years, the fee was vested, and the term good, being drawn out of the fee.

The same point, as I have already observed, was established in the case of *Vick v. Edwards*, though Lord *Talbot* did not seem to advert to the circumstance, of the fine's being levied by the *person* who had the *particular* estate for life, as well as the contingent remainder; and consequently destroying that contingent remainder, instead of merely passing it by estoppel. But for the reasons I have above noticed, the heir appears in that case to have been excluded at all events.

Supra, p.
284.

That

That a contingent remainder cannot be passed or transferred, by a conveyance at law, before the contingency happens, otherwise than by way of estoppel by fine (or by a common recovery, wherein the person intitled to the contingent estate comes in as vouchee, agreeable to the opinion delivered by the court in *Pells v. Brown's* case, though Mr. Piggot makes a *quære* upon it) appears by the above cited cases of *Weale v. Lower*, and *Vick v. Edwards*. But contingent estates it seems are assignable in equity as I shall shew hereafter.

(289)

2 Cro. 592.
And vide
Pigg. Com.
Recov. 132.

Vide
Wright v.
Wright infra.
441.

And contingent estates, appear formerly to have been held, not devisable by the person intitled thereto, whilst they remained contingent, as in the case of *Bishop v. Fountain*: where *A.* devised land to a trustee and his heirs, in trust in the first place for payment of debts, then to pay an annuity to his (the testator's) natural daughter *M.* for life, and if she had any children, to convey successively to those children, and for want of such issue, or if such issue died without issue, then to be conveyed to *C.* and his heirs; and the testator gave *C.* an annuity till such estate should come to him, and *if he claimed any thing during the life of M. or any of her issue, then he was to be excluded having any thing out of the estate.*

Bishop v.
Fountain.
3 Lev. 427.

C. died,

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C. died, leaving a son J., who during the life-time of M. devised the lands and died. M. afterwards died without issue. The heir of the trustee thereupon conveyed the lands to the heirs of C.; upon which the devisee of J. brought a bill to have the lands conveyed to him, supposing an equitable estate to have been vested in C., and consequently that it was well devised by J. the son and heir of C. But it was resolved, it seems, by the Lord Keeper, with the assistance of Ch. Justice Treby and Baron Powell, after many arguments, that J. had no estate *devisable*, but a mere possibility during the life of M. or any of her issue; and so the devise by him was void, and the lands well conveyed to the heirs of C.

The reasons upon which the estate devised to C. was held a mere possibility, during the life of M. or any of her issue, are not stated or mentioned; but probably this resolution was grounded on the clause, which excluded C. from having any thing out of the estate, if he claimed any thing during the life-time of M. or any of her issue; which clause possibly was considered, as rendering the devise to C. dependent upon the condition of his not claiming during the life of M. or any of her issue, and consequently, *contingent* until that condition was performed; which could not be in his life-time before the decease of M. without issue.

Unless

Unless we recur to some reason of this nature, for suspending the effect of the devise to C. in that case, it should seem, that he would have taken the *equitable remainder in fee*, expectant on the decease of M. and the failure of issue of her body; which would have been a vested estate, and clearly devisable.

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Vide 9 Co.
Rep. 127.
Sunday's
case, & 2.
Vez. 610.
Southby v.
Stonehouse.

So in the case of *Ives v. Legge* hereafter more particularly stated, according to a manuscript note which I have been furnished with, Lord *Hardwicke* said, that in order to make the devise by *W. L.* good, it must be a *vested remainder*.

Vide *infra*.
P. 296.

But we are to observe, that the opinion of contingent remainders not being devisable, seems to have arisen from too narrow a construction of the word "*having*" in the statute of wills, by understanding that word as "*seised of*," as well as from the usual form of pleading, that the testator died *seised of*, &c.; which predicament not being applicable to estates, before they are vested, would, if requisite to the power of testamentary disposition, have ranked them, in that respect, with estates not acquired till after *the time* of the will. And therefore we find that contingent interests of chattel, or personal interests, were
allowed

allowed to pass by testamentary dispositions, though inheritable interests were not so.

But modern decisions, have extended the same power of testamentary disposition to contingent and executory *descendible* interests, by considering the word "*having*" in the statute of wills, as equivalent to *having an interest in*.

Selwyn v.
Selwyn.
2 Bur. 1131.
2 Black Rep.
251.

Thus where J. S. being tenant for life, remainder to his first son &c. in tail male, he, with his first son J. conveyed the lands by bargain and sale inrolled, to an intended tenant to the *præcipe*, for suffering a common recovery, which was to enure to the use of J. S. the father, for life, remainder to the use of J. the son in fee. Afterwards, and before the return of the writ of entry, J. the son, made his will, and thereby devised *all his freehold and other estates, whereof he or any person or persons in trust for him, were seised or possessed, either in reversion, remainder or expectancy, and all his estate, right, title and interest therein*, to his father in fee. And he died the day after the return of the writ of *seisin*, without altering or re-publishing his will. And, upon a question referred from Chancery to the Court of King's Bench, Whether the hereditaments comprised in the bargain and sale passed by the son's will; which

which turned on two points, *First*, Whether at the date of the will he had any use estate or interest in the premises to *devise*, *secondly*, if he had, whether the subsequent recovery was a revocation; the court of King's Bench certified their opinion, that the hereditaments comprised in the bargain and sale passed by the will of Y.

The reporter says, that in the course of the arguments in the above case, the court repeatedly expressed their approbation of the case of Sir John Ferrers and Sir John Curson, against Sir Richard Farmer and others, *Cro. Jac.* 643.; and therefore it is likely, that they considered the whole as *one conveyance*, which must relate to the date of the bargain and sale; which was perfected, made absolute, and delivered from objections by the subsequent ceremonies.

He says, it is probable too, from some expressions dropped, they might think that Y. the son, by virtue of the bargain and sale, had a voidable contingent executory use, to arise out of the subsequent common recovery—That such a use *was devisable*; and that the subsequent recovery executed such use, and made it absolute.

And

1 Black. Rep.
605.
Supra, p. 49.

And afterwards, in the case of *Roe v. Griffiths*, Lord Mansfield said, that in *Selwyn v. Selwyn*, he was prepared to have shewn with the concurrence of all his brethren, that in all contingent springing and executory uses, where the person who is to take is certain, so that the same may be descendible, they are also devisable. That they were convertible terms.— Though the great ground on which the court went, in that case, was, that the deed, recovery, and whole transaction, were to be considered as one conveyance.

Moor et Ur.
v. Hawkins,
before Lord
Northington
in 1765. cited
by Lord
Loughbo-
rough.
Black Rep.
Com. Pl.
33-4.

And where a testator devised his real estates, in trust for his son J. and that if he should die without issue, under age, they should go to C., his heirs and assigns. C. afterwards devised “all his estates whereof he was seised in possession, remainder or reversion,” and died in the life-time of J. who afterwards died under 21, and without issue. Lord Northington said, “he never had a doubt since he was 25 years old, that those contingent remainders were devisable, notwithstanding some old authorities to the contrary; that he sent the question, however, into the King’s Bench, in the case of *Selwin v. Selwin*, for the satisfaction of the parties; and the certificate of the Judges, in that case, implied, he thought, that they agreed with them in
“opi-

“opinion — and he thought the point was
“settled, and ought not to be shaken.”

So where a testator devised his dwelling-house, &c. to his brother T. L., until his (the brother's youngest) son J. or any other of his younger sons, should attain the age of twenty-one years; and in case he should have no younger son that should attain the said age, but only one son that should attain it; then until such only son should attain that age.— And when his said nephew J. or any other of the younger sons of his said brother T. L. should attain the age of twenty-one years, then he gave his said dwelling-house, &c. unto his said nephew J. or unto such other son as for the time being should be a younger son of his said brother T. L., and should first attain his age of twenty-one years, and to the heirs and assigns of such younger son for ever. The testator left his said brother his heir at law, and T. and the said J. the sons of his said brother (who were his only issue). J. died under 21 years of age; and afterwards T. in the life-time of his father T. L. devised *all his worldly estate, of what nature or kind soever, whether in possession, remainder or reversion, that he should die seised or possessed of, interested in, or intitled to, invested in, or should belong to him at his decease, wheresoever or howsoever in any manner or wise unto his wife in fee.*

Roe v. Jones,
et al' Black.
Rep. Com.
Pl. 30.

fee. Upon this case three questions arose: *First*, Whether there was a *vested* interest in *T.*; *secondly*, Whether, if it was *contingent*, it was *devisable*; and *thirdly*, Whether it *passed* by the will.

Lord *Loughborough* said, the discussion of the first question was unnecessary; for, taking it to be a springing contingent executory use in *T.*, they were all of opinion that it was *devisable*, and passed by his will. And he observed upon the case of *Moor v. Hawkins* above cited, that it was a liberal and right determination, and judgment was given accordingly.

3 Durnf. &
East, 88.

And upon a writ of error in the court of King's Bench, that court confirmed the decision of the Common Pleas in the same case. Lord *Kenyon* observed, that the statute which enabled persons "*having*" any manors, lands, &c. to devise, must mean *having an interest* in the lands; and he distinguished between such a contingent interest, and a *mere possibility*, like that which an heir has from his ancestor; which was nothing more than the *hope of a succession*, and not subject to disposition. And his Lordship hoped the point would be understood to be fully at rest. — *Ashurst J.* said, the plain meaning of the statute was, that every person who had a *valuable*

able interest in lands, should have the power of disposing of it by will. Buller J. observed, that if it were *such an interest* as was *descendible*, it seemed strange to say it was not also *devisable*; that they must both be governed by the *same principle*; and, that it was a sound distinction that had been taken by the Chief Justice, between a *bare possibility* and a *possibility accompanied with an interest*. — And Grose J. remarked that the 4th sect. of 34 and 35 H. 8. c. 5., which was explanatory of 32 H. 8. c. 1, declared that all persons *having* a sole estate or *interest* in lands, &c. might devise; which did not include a *bare possibility* or hope of succession; but a *possibility accompanied with an interest*.

The above authorities, I apprehend, have, on solid grounds, established the power of testamentary disposition of contingent and executory estates and possibilities, *accompanied with an interest*; and of such as would be *descendible* to the heir, of the *object* of them *dying* before the contingency or event on which the vesting or acquisition of the estate depended. But the decisions do not appear to reach those cases, where *neither* the contingent interest itself is transmissible from any person until the contingency decides him to be an object of the limitation, *nor* the person or persons, to or amongst whom the con-

tingent or future interest is directed, is or are *in any degree ascertainable*, before the contingency happens ; as in the case of a contingent or executory limitation to the right heirs of *J. S.* (then living) where the description of the person to take, cannot be confined to or among any ascertainable person or persons, during the life of *J. S.* ; nor can it therefore be said, in whom *such interest* is ; nor, consequently, that it is in *any body*, during that period : nor will it be transmissible or descendible, from any one dying *before* it becomes vested.

Vide *supra*,
p. 18.

1 Eq. Abr.
186. c. 1.
Infra, 322.
350.

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1 Eq. Abr.
186. pl. 3.

And it is further to be observed, with respect to contingent remainders, (what indeed is but an inference from the observations I have already made upon the definition of a remainder) that a fee cannot, at common law, be limited on a fee ; as if lands are limited to one and his heirs, and if he dies without heirs, then to another ; this last limitation is void. So if lands are given to one and his heirs so long as *J. S.* has issue, and after the death of *J. S.* without issue, to remain over to another ; this remainder is likewise void, because the first devisee had a *fee*, tho' it was a base and determinable fee.—So where one devised lands to the prior and convent of *B.* so that they paid annually to the Dean and Chapter of *St. Paul's* fourteen marks, and if they

they failed of payment, that their estate should cease, and that the said dean and chapter and their successors should have it; it was held that this limitation over was void; because as the first devise carried a fee, nothing remained to be disposed of; and executory devises after a fee simple were in former ages unknown.

But at this day such limitations may be good in a will, or by way of use, upon a contingency that may happen within a reasonable period; tho' this not by way of direct remainder, but by way of executory devise, or springing or shifting executory use.

1 Eq. Abr.
186. c. 2.
Supra, 195.
—203.
Infra, 302.
—3. 317—
18—21.

However, we are to remember, that altho' a fee cannot, in conveyances at common law, be mounted on a fee; yet two or more several contingent fees may be limited, merely as substitutes or alternatives one for the other, and not to interfere; but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. Thus in the above cited case of *Loddington v. Kime*, it was held, that the first remainder was a contingent remainder in fee to the issue of *A.* and the remainder to *B.* was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort

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Loddington
v. Kime.
Supra, p. 161.
1 Ld. Raym.
208.

And vide
Dougl. Rep.
486. The
Reporter's
note there
noticed.
Infra, 431.
Vide infra
296. in lves
v. Legge.

of alternative limitation, was termed a contingency with a double aspect. For if *A.* had issue-male, the remainder was to vest in that issue in fee; but if *A.* had no issue-male, then it was to vest in *B.* in fee; and these were limitations of which the one was not expectant upon, and to take effect after the other, but were cotemporary; to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed.

Doe v.
Holmes,
3 Wilf. 237.
241.
2 Black. 777.

So where the testator devised lands to his son *J. L.* *with impeachment of waste*, for and during the term of his natural life; and from and after his decease, he devised them unto *the heirs male or female* lawfully to be begotten of the body of his son *J. L.* *for ever*, they paying out of the same a sum of 400*l.*, 200*l.* part thereof to *E. B.*, which legacy he willed should be paid within two years *after the death* of his son *J. L.*; and upon neglect of payment, he devised the lands to *E. B.* and her heirs, to hold for such a term of years, as the said sum might be raised out of the rents and profits thereof. And afterwards that the land should return into the possession, and for the sole use of the *heir-male or female* lawfully begotten by his said son, and to his and her heirs *for ever*. But if his said son *J. L.* should die, *leaving* no lawful issue, he then gave

gave the lands to *E. B.* her heirs and assigns for ever. *J. L.*, after the testator's decease, suffered a recovery to the use of himself in fee, and died without leaving or ever having had any issue.

The question was, whether the remainder to *E. B.* was barred by this recovery? It was contended that it was not; for that *J. L.* took only an estate for life, with contingent remainder in tail to his issue, with a vested remainder in fee to *E. B.*; in which case *J. L.* being only tenant for life, could not by his recovery bar such vested remainder.

We are to observe, it was necessary to contend that the limitation to the heirs-male or female &c. of *J. L.* was a *contingent* remainder, and did not *vest* in *J. L.*, and also that it gave a remainder in *tail* only to such issue, and not in *fee*; for if this limitation vested an estate-tail in *J. L.* then his recovery indisputably barred the remainder to *E. B.*; and if it gave a contingent remainder *in fee* to the issue of *J. L.* then the other remainder to *E. B.* must be contingent likewise (because no remainder can vest after a contingent fee is first limited) and then it was destroyed by the recovery of *J. L.* the tenant for life.

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Vide supra,
p. 161 &c.

N n 3

But

Vide infra.
299. et seq.

But the court, without determining whether *J. L.* took an estate only for life or in tail, were clearly of opinion, that take which he would, as he certainly took a freehold sufficient to support a contingent remainder, the limitation to *E. B.* could not enure as an executory devise; because that is not admitted where there is a preceding freehold capable of supporting a contingent remainder; and then as a remainder, if *J. L.* took an estate-tail, it was clear his recovery barred it; if he took only for life, then they were clear that the subsequent limitation to the heirs male or female, &c. of *J. L.* was a good contingent remainder in fee-simple; and of consequence the limitation to *E. B.* must also be contingent and not vested; for a remainder cannot vest after a remainder in fee. Therefore they adjudged that the remainder to *E. B.* was barred or destroyed.

Goodright v.
Dunham.
Doug. Rep.
251.

And in a subsequent case, where a testator seised in fee in remainder expectant on the decease of *A.* devised to his son *J. L.* for life, and after his death to all and every his children equally and to *their heirs*; and in case *his said son died without issue*, he gave the premises unto his the testator's two daughters and their heirs, equally to be divided between them.—After the decease of the testator and of *A.*, *J. L.* entered and suffered a recovery,

recovery, and died without ever having had any issue. It was admitted that J. L. took no more than an estate for life: (this being to all the children equally, we may observe, was incompatible with an estate-tail in the father). But it was contended, that the words *their heirs* in the limitation to his children, meant *heirs of the body*; the limitation over being to the testator's sisters, who came within the line of *collateral* heirs of such children. But here we may observe, the words introducing the limitation to the *sisters*, were not, in *default of heirs of the children*, but in case *the son should die without issue*; which being tacked to the *preceding clause*, the court held must mean the same thing, as "*in case he died without children.*" They had none of them a doubt, that both limitations, (*viz.* to the children of J. L. and to the testator's sisters) were *contingent remainders*; there were no expressions to restrain the sense of the word "*heirs,*" in the limitation to J. L.'s children.—That the word *heirs* in the limitation to the daughters, certainly did not mean "*heirs of the body,*" and they could not give the same words two *different* senses in different parts of the said will. The consequence of this opinion was, that the recovery barred the remainder to the sisters.

Vide *infra*,
P. 350.

Doe v. Per-
ryn.
3 Durnf. &
East 484.
Supra, 240.

And again, where a testator devised lands to his daughter for her life, remainder to trustees to preserve contingent remainders; then to all and every the children of his said daughter by her husband C. and their heirs for ever, to be equally divided between and among such children (if more than one) share and share alike; but if only one such child, then to such only child, his or her heirs for ever; and in *default of such issue*, to C. for life. It was held, that the limitation to the children was a contingent remainder in fee; which having vested in their children born after the testator's decease, though dying in their parents' life-time, the subsequent remainders were thereby precluded from taking effect. For the court held the words in default of *such issue*, to mean in default of *such children*.

Upon the three last cases, we may observe, that the words introducing the remainders over, after the limitations to the heirs &c. or children, were not allowed to abridge or qualify the extent of the words *heirs* limiting the fee to such heirs &c. or children, as they would have done, if they had been referrible to the words of limitation to the heirs &c. or children.—In the two first they *expressly* applied, *not* to issue of the heirs &c. or children; but to issue of the parents; and there was no circumstance to extend the construction beyond the words; consequently the reference rested

rested with the expression, and was confined to the heirs &c. or children themselves, as the *issue before mentioned*. And in the last case, there being no sort of apparent intention or ground, for referring the words, *such issue*, to heirs of the children, which children themselves were the *issue before mentioned*, they were very reasonably referred to such children. But we are to distinguish these cases from *Beck's* case above cited, where the limitation to the first son of *J.* that should have *heirs male* &c. and to his heirs *in perpetuum*, though it expressed an estate in fee, yet was considered (it seems) as controled and abridged into an estate-tail, by the subsequent words *in default of such issue* of his body; according to the observation of *Powell* Justice, who (in the case of *Idle v. Cook*) said, that though the limitation to the first son of *J.*, who should have *heirs male* &c. was only a description of the person, yet the words *such issue*, might likewise well enough refer to the words *heirs-males*, which might help the construction.

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Supra, p. 276.

Vide 1 P. W.
76.

Indeed the words "such issue of *his* body," there, were as referrible to the first son of *J.* as to *J.* himself; and the *son* being the last antecedent; the relative pronoun *his* was properly enough referred to that son.

And

Ives v.
Legge in
Canc. Feb. 1,
1743. and
vide 3 Durnf.
& East 488
in note.

Vide supra,
291.

And where a testator charged his estates with 200*l.* to be laid out in a house, which he gave to his daughter *M.* for her life; and after her decease, then the same to go and “be enjoyed by the *children of her body begotten and their heirs*, if she should have any.” And in default thereof to *W. L.* one of his younger sons, his heirs and assigns: after the testator’s decease, the son *W. L.* devised his interest in the house and died in the life-time of *M.*; and upon the death of *M.* without children, the question arose, whether the devise by *W. L.* was good; it being contended by the testator’s grandson and heir, that the devise to the children of *M.* was *in fee*; and consequently, the alternative devise to *W. L.* a *contingent remainder*; and as such, not devisable by him in the life-time of *M.* Lord Chancellor *Hardwicke* (according to a manuscript note I have of the case) said, that in order to make the devise to *W. L.* good; the devise to him by his father’s will must be a vested remainder. That he thought *M.* took no estate-tail; the devise was to her expressly for life; and therefore no greater estate should arise by implication: for though a devise to *A.* and his children, or to *A.* and after his death to his children would give *A.* an estate-tail, if he had no children at the time, according to *Wild’s case*, 6 *Co. Rep.* yet, in the principal case, there were words
of

of contingency, viz. "If she should have any," which differed the case from *Wild's*; and there did not appear to be *any intention*, which would have been fulfilled by over-ruling the estate for life. That as to the estate which the children of *M.* would have taken, it certainly would have been a contingent remainder in fee, if there had been no limitation over; or if *W. L.* had been a *stranger*: but he being uncle of the children, it was impossible they should die *without heirs*, during the existence of him or any of his issue: that the doubt arose from the *equivocal sense* of the words "in default thereof," whether they related to the children of *M.* or to the heirs of such children? If to the first, the case then amounted to that of *Loddington v. Kime*, and made it a fee with a double aspect, or, as it is called in that case, two concurrent contingencies, of which either is to start according as it happens; being remainders cotemporary, and not expectant one after another. But then both would be contingent, as well that to the children of *M.* as that to *W. L.*, which was a construction never made without an absolute necessity. That there was no such necessity in the principal case, the words in "*default thereof*," taking in both the contingencies, as well that of *M.*'s dying without children, as of her children dying without heirs; as in the ordinary limitations in settlements. And as the court

Vide *supra*,
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Vide *infra*,
299. et seq.

court never construed a limitation into an *executory devise*, where it might take effect as a *remainder*, because the former puts the inheritance in abeyance; so neither did it construe a remainder to be *contingent*, where it could be taken for *vested*; because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by a fine or feoffment; which would have been the case there, by the construction contended for by the heir of the testator; since by taking it for a contingent remainder in *W. L.* it would have been in the power of *M.* to destroy *the whole*, before the birth of a child.

Vide 3 Durnf.
& East 491.

In the last case we are to observe, that the word *thereof*, upon which the construction turned, was equally applicable to the *heirs* of the children, as to the *children* themselves; and the *heirs* being the last antecedent, there was no ground for excluding the reference to them; which reduced the case to that of a devise to one and *his heirs*, and in default of *heirs*, then to a person who was a *collateral* heir of the first devisee.

Vide *infra*,
p. 350.

Doe v. Reason, cited
3 Wils. 244.

In another case, indeed, where a testator devised lands to *A.* during the term of her natural life, without impeachment of waste; and immediately after her decease to such issue of her body as should then be living

ing, and to the heirs of such issue; that is to say, if one child, the whole to that child and its heirs, if two or more children then to them equally among them share and share alike, as tenants in common; and in case *A.* should die without issue of her body begotten then living, or in case all such issue should die without issue, so that all *A.*'s descendants should be dead without issue, then he devised the lands over to *T.* and *J.* their heirs and assigns for ever. After the testator's decease, *A.* and her husband suffered a recovery, and she died without ever having had any issue. The same question arose here as in the above cited case of *Doe v. Holmes*; the court held, as in that case, that the limitation to *T.* and *J.* was not an executory devise, for *A.* took an estate for life, which was capable of supporting a contingent remainder; and that the limitation to *A.*'s issue was only a remainder in tail (as in *Beck's* case above cited) for that the subsequent words *and if all such issue shall die without issue*, restrained the preceding limitation to the heirs of such issue, and reduced it to an estate-tail; the consequence of which was, that the subsequent limitation to *T.* and *J.* was a vested instead of a contingent remainder, and so not barred by the recovery of *A.*

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Supra p. 276.

But in a case where the devise was to *G. P.* for life, remainder to her first and other sons in tail general, "and for default of such issue-
MALE,"

Keene v.
Dickson.
M. 24 Geo.
3. in B. R.
cited by Mr.
Just. Buller.
3 Durnf. &
East 495.

MALE," remainder over; it being contended that the word *male*, might be rejected, the court said, they could not do it; but held, that the remainder over was a *contingent* devise only, on the event of there never being a son; and if there were a son ever born, though he died, the remainder over would be void; in that case, it seems, a son was born, who died during the life of G. P. and on his birth the estate vested in him; and the limitation over, it seems, failed.—Here the court referred the words *such issue-male*, to *sons* before mentioned.

Vide infra
299, and particularly Car-
wardine v.
Carwardine,
infra 302.

Here, I shall close the distinct title of contingent remainders, with apprising the reader, that there are some other cases, which might, with propriety enough, have been inserted under the same title; particularly some of those, wherein the question, whether a limitation should operate as a *contingent remainder*, or as an executory devise or future use, has been agitated, and the construction of a contingent remainder has prevailed; but as most of them must have been also noticed under the head of executory devises; and that of contingent remainders has already swelled in the progress, rather beyond the limits I at first expected, I think it most convenient to refer them to the ensuing Chapter of Executory Devises.

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